Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

RAMSEY CLARK and LAWRENCE W. SCHILLING,

Petitioners,

vs.

MARGARET THATCHER, former Prime Minister of Great Britain and THE UNITED KINGDOM,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether sanctions under Rule 11 and under Rule 38 of the Federal Rules of Appellate Procedure were improperly imposed upon plaintiffs' attorneys for their assertion of claims against Margaret Thatcher, individually and as Prime Minister of the United Kingdom, and against the United Kingdom, to recover damages for deaths and personal injuries, because the claims were factually sufficient, were not filed for an improper purpose, were warranted by existing law or a good faith argument for the extension, modification or reversal of existing law and were not frivolous.

2. Whether attorneys can be validly sanctioned under Fed.R.Civ.P. 11 for filing a complaint asserting claims for damages against a foreign sovereign in a

United States District Court in reliance on a direct holding of a United States Court of Appeals that the Alien Tort Statute confers subject matter jurisdiction upon the District Courts over such claims notwithstanding a defense of foreign sovereign immunity, if after the complaint is filed, the United States Supreme Court grants certiorari, and after the District Court dismisses the complaint, reverses the holding of the Court of Appeals relied on by the attorneys in filing the complaint.

3. Whether the Foreign Sovereign Immunity Act provides any impediment to the assertion of jurisdiction under the Alien Tort Statute for claims for damages for deaths and personal injuries against Margaret Thatcher individually and in her official capacity as Prime Minister of

the United Kingdom.

4. Whether the Court of Appeals in reversing the District Court's clear exercise of his discretion not to impose Rule 11 sanctions upon plaintiffs' attorneys and not to make any of the specific findings required by Rule 11, and in remanding the case to the District Court "for imposition of an appropriate sanction," erroneously failed to give the required deference to the District Court's decision to deny sanctions and erroneously precluded the District Court on remand from exercising his full discretion under Rule 11.

5. Whether Rule 11 sanctions were validly imposed by the District Court upon plaintiffs' attorneys for the assertion of claims in the complaint where the District Court did not

exercise its own discretion in imposing the Rule 11 sanctions or make any finding required by Rule 11.

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* The parties to the appeal in the Court of Appeals whose judgment is sought to be reviewed are the two petitioners and two respondents named in the caption of this petition.

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OPINIONS IN THE CASE

The per curiam judgment of the Court of Appeals together with the dissenting statement of Circuit Judge Wald is reported, 960 F.2d 1060 (D.C. Cir. 1992), A1. The District Court's memorandum and order on remand filed March 14, 1991, is unreported, A14. This Court's denial of plaintiff's petition for a writ of certiorari without an opinion is reported, 495 U.S. 932 (1990). The initial decision of the Court of Appeals is reported, 886 F.2d 438, A8, as is the Court's order, id, at 441, A6. The original memorandum and order of the District Court dismissing the complaint and declining to impose sanctions, is reported, 702 F.Supp. 319 (1988), A29.

JURISDICTIONAL GROUNDS IN THIS COURT

The per curiam judgment sought to be reviewed was entered on April 10, 1992, A1. A per curiam order denying petitioners' timely petition for rehearing was entered on June 26, 1992, A29. 28 U.S.C. §1254(1) is the statutory provision that confers jurisdiction on this Court to review this case by writ of certiorari. This petition is being timely filed pursuant to Rule 13 of the Rules of this Court within 90 days after the date of denial of petitioners' petition for rehearing in the Court of Appeals.

RULES INVOLVED IN THE CASE

Rule 11, Fed.R.Civ.P.

Signing of Pleadings, Motions, and Other Papers; Sanctions

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after

the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Rule 38, Fed.R.App.P.
Damages for Delay

If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

STATEMENT OF THE CASE

This case is before this Court for the second time. A previous petition for a writ of certiorari by plaintiffs seeking review of the dismissal of the complaint on motion before answer was denied in May 1990, 495 U.S. 932, No. 89-1497.

The present petition seeks review of the affirmance by the Court of Appeals for the District of Columbia of an order of the District Court on remand directing that petitioners Ramsey Clark and Lawrence W. Schilling, counsel for plaintiffs, each pay the British defendants, Mrs. Margaret Thatcher and the United Kingdom, $10,000, as a Rule 11 sanction. A14. It also seeks review of orders of the Court of Appeals imposing a sanction of $16,852.07 upon petitioners

under Fed.R.App.P. 38 which petitioners personally paid to the United Kingdom in August 1990 with the caveat that with the case still pending action should be taken to make sure the money will be available for repayment if the Rule 38 award is vacated or reversed.

The first petition for a writ of certiorari refrained from addressing the questions of sanctions as they then stood -- questions raised by the Court of Appeals' per curiam reversal of the District Court's denial of Rule 11 sanctions and by its Rule 38 sanctions award to Margaret Thatcher and the United Kingdom.

The present petitioners, acting then as attorneys for the petitioners, the plaintiffs, explained the absence of any argument about sanctions to this Court as they had previously explained to the

Court of Appeals in seeking rehearing, that to press the sanctions issues would demean the claims of their clients and constitute a conflict of interest. The initial petition for certiorari stated at 64:

> "Counsel, bound to zealously assert petitioners' rights, cannot consistent with that obligation, respond in the same action in self defense to charges that sanctions should be imposed on counsel because petitioners' claims are frivolous. No submission on the sanctions issues, oral or written, has been made by counsel below and none will be made here, except to say counsel have never filed an action they believed to be more important to constitutional government and the rule of law, and believe these claims are right as a matter of law."

This is an action for damages filed in the United States District Court for the District of Columbia in April 1988 by or on behalf of fifty-five individuals killed or injured by the unprecedented bombing of Libya by U.S. military aircraft on the direct order of the

President in April 1986. A second complaint containing identical allegations was filed on behalf of two hundred eighty additional individuals in U.S. District Court. Dakhil v. Reagan, No. 89-1074 (LFO) D.D.C.

The complaint alleges violations of the law of nations, international laws, the Constitution, laws and treaties of the United States, and various state and foreign laws, including claims under the Federal Tort Claims Act, the Alien Tort Statute, the Foreign Claims Act and RICO. Laws and treaties violated were identified in paragraphs 1, 3, 4, 5, 33, 37, 41, 43, and 46-50 of the complaint. A30.

The complaint names as defendants, President Reagan and Mrs. Thatcher, individually and in their official capacity, the United States, the United

Kingdom and several officials and former officials of the United States.

The complaint alleges that both the United States and the United Kingdom are being sued under 28 U.S.C. §1350, the Alien Tort Claims Statute, for their clear violations of settled principles of international law for which they are not entitled to invoke any immunity as sovereigns and that with respect to claims under the Federal tort Act the United States has waived its Sovereign Immunity. A41.

In dismissing the complaint on motion before answer the District Court declined to impose Rule 11 sanctions requested by both the United States and the British defendants. 702 F.Supp. 319 (D.D.C. December 23, 1988), A17.

In denying sanctions the District Court stated, A26-27:

> . . . The case offered no hope whatsoever of success, and plaintiffs' attorneys surely knew it.
>
> The injuries for which suit is brought are not insubstantial. It cannot, therefore, be said that the case is frivolous so much as it is audacious. . . .

The Court surmised that the case was brought as a public statement of protest. It observed that the Courts of the United States serve in some respect as a forum for making such statements and should continue to do so. The Court relied on Talamani v. Allstate Insurance Co., 470 U.S. 1067, 1070-71 (1985), in which this Court declined to impose sanctions upon an attorney for filing a jurisdictionally defective appeal. The District Court quoted the following passage from the opinion of Justice Stevens in Talamani, writing for himself and three other Justices, explaining why sanctions

against the attorney were unwarranted:

"Freedom of access to the courts is a cherished value in our democratic society. Incremental changes in settled rules of law often result from litigation. The courts provide the mechanism for the peaceful resolution of disputes that might otherwise give rise to attempts at self-help. There is, and should be, the strongest presumption of open access to all levels of the judicial system. Creating a risk that the invocation of the judicial process may give rise to punitive sanctions simply because the litigant's claim is unmeritorious could only deter the legitimate exercise of the right to seek a peaceful redress of grievances through judicial means."

The District Court ruled that "for essentially those reasons" defendants' applications for an award of sanctions would be denied.

Plaintiffs appealed the dismissal of their complaint. Cross-appeals were taken by the United States, and by Mrs. Thatcher and the United Kingdom. Without taking any further steps to perfect its appeal, the United States filed a motion

to dismiss its cross-appeal, thus abandoning its claim for Rule 11 sanctions.

Before the record on appeal or briefs were permitted to be filed, Mrs. Thatcher and the United Kingdom moved for summary disposition of their cross-appeal seeking both reversal of the denial of Rule 11 sanctions, and an award of damages and costs under Fed.R.App.P. 38. Under the rules of the Court of Appeals governing motion practice, petitioners were permitted a limited written response and no oral argument.

The Court of Appeals granted the United Kingdom's motion for summary disposition in a per curiam opinion, A8, and order, A6. It summarily affirmed the dismissal of the complaint "substantially for the reasons stated" by the District Court, A7, and summarily

reversed the denial of Rule 11 sanctions and granted fees and costs on appeal under Rule 38. In awarding damages and costs under Rule 38 for a frivolous appeal, the Court relied entirely on this Court's decision in Argentine Republic v. Amerada Hess Corp., 488 U.S. 428 (1989) which reversed 830 F.2d 421 (2d Cir. 19870), and ruled that the FSIA "provides the sole basis for obtaining jurisdiction over a foreign state in our courts,'" and that "a foreign states' use of military force allegedly in violation of international law fell outside any of the exceptions to sovereign immunity provided by the FSIA." A12. The Court of Appeals directed that submissions be made with respect to fees and costs under Rule 38 which it later taxed at $16,852.07, virtually the full amount requested, upon appellants' attorneys jointly and

severally, and remanded the case to the District Court for "imposition of an appropriate sanction" under Rule 11.

Plaintiffs filed a petition for rehearing and suggestion for rehearing en banc that were denied on December 22, 1989, with Judges Wald, Mikva and Ruth B. Ginsberg voting to grant en banc review on the issue of sanctions.

As previously stated, plaintiffs then filed a petition for a writ of certiorari that was denied on May 14, 1990. 495 U.S. 932.

On June 11 1990, this Court decided Cooter and Gell v. Hartmarx Corp., 496 U.S. 384, holding that Rule 11 sanctions are entirely within the District Court's discretion, subject only to deferential, abuse of discretion review.

On remand, written submissions were made by the British defendants and

petitioners on the issues of sanctions under Rule 11. In their submission petitioners addressed for the first time the merits of the issues of the sanctions that had been imposed against them.

Petitioners urged upon the District Court that it had full discretion on remand to hold that Rule 11 had not been violated or to choose any form of appropriate sanction.

Petitioners emphasized that the applicable provisions and principles of international law binding on the United States and the United Kingdom on which plaintiffs relied were fully analyzed in more than 120 pages of affidavits by two experts in the field, Prof. William Thomas Mallison, and Prof. Francis A. Boyle, that were filed in the District Court in support of the complaint.

Petitioners cited to the Court two

published commentaries critical of the sanctions, D'Amato, The Impositions of the Sanctions for Claims Arising from the U.S. Air Raid on Libya, 84 Amer.J.Int.Law 705 (1990); 19 International Law News, From the Courts: International Lawyers Sanctioned... 8 (ABA Section of International Law and Practice Summer 1990). Petitioners contend that the views of Professor D'Amato, an expert in international law, published in a responsible law journal precluded liability under Rule 11. Professor D'Amato's article expresses the view that the Saltany claims for damages under the Federal Tort Claims Act were well pleaded and reasonably sustainable under existing law, at 707, see also 710. It argues that plaintiffs' allegations of war crimes made out a solid prima facie case, that immunity for these war crimes for

the United Kingdom and its head of government, Margaret Thatcher, was questionable even after the U.S. Supreme Court decision in Amerada Hess, it being highly unlikely that Congress in enacting the Foreign Sovereign Immunity Act intended to broaden the scope of sovereign immunity so as to repudate the historic precedent of Nurenberg, at 710.

In their presentation to the District Court on remand petitioners disclaimed any intent to bring the action as a statement of protest. They stated then and reiterate now that they never have filed a case they believe to be more right in law.

Petitioners pointed out that neither the District Court nor the Court of Appeals found the complaint or the plaintiffs' claims to be frivolous, and that there has been no judicial

determination in this case at any level, given that the dismissal of the complaint and affirmance were on grounds of immunity, whether defendants' conduct in bombing Libya as they did in 1986 was illegal and constituted war crimes, crimes against humanity and crimes against peace.

In a two page memorandum and order of March 14, 1991, A14, the District Court ruled on remand that the Court of Appeals decision was an unequivocal direction to it to impose a Rule 11 sanction upon plaintiff's counsel, that no appropriate "non-monetary" sanction comes readily to mind, that none was suggested and that the Court was shown no authority for imposing an innovative sanction such as community service. A16-17. The Court ordered petitioners to each pay the British defendants the sum

of $10,000, "as a case-specific balance between equity, deterrence and compensation," citing Hilton Hills Corp. v. Banov, 899 F.2d 40, 46 (D.C.Cir. 1990).

Petitioners appealed seeking reversal of the $20,000 awarded under Rule 11 and the $16,852.07 awarded under Rule 38. Mrs. Thatcher and the United Kingdom moved on this appeal as they had on the first for summary disposition. The motion was denied.

The appeal was fully briefed and argued and on April 10, 1992, a judgment per curiam upholding the Rule 11 sanctions was issued for the Court, Edwards and D.H. Ginsburg, C.J.J., with Judge Wald dissenting. 960 F.2d 1060. A1.

The judgment per curiam held that the law of the case barred petitioners'

challenge to the award of Rule 11 and Rule 38 sanctions, there being no apparent clear error combined with manifest injustice. It held Cooter did not constitute intervening law on the Rule 11 issue in view of the prior panel's determination that the District Court had found a Rule 11 violation.

Judge Wald, dissenting, concluded that an exception to the law of case was justified because the prior panel's decision was erroneous and worked a grave injustice. She found Cooter did represent an intervening change in the law by establishing a "clearly erroneous" standard of review and that the prior panel failed to accord the deference required by Cooter to the District Court's denial of Rule 11 sanctions.

In Judge Wald's opinion, the prior panel reached beyond the District Court's

clear exercise of his discretion not to impose sanctions and did so without making specific findings required by Rule 11, relying instead on the District Court's side comments about the likelihood of plaintiffs' prevailing. In her view, the majority decision will chill well founded future claims.

Petitioners sought rehearing by the panel and suggested that the case be reheard en banc. The petition for rehearing was denied, 2-1, on June 26, 1992, A29, as was the suggestion for rehearing en banc.

This petition follows.

REASONS FOR GRANTING THE WRIT

A. The Case Involves Issues of Fundamental Constitutional Importance and International Concern

This case is critically important

because of its great impact on the role, if any, the judicial branch created by Article III of the Constitution and the private lawyers practicing before it will play in determining whether the rule of law applies to illegal acts by the executive branch, the military forces of the United States and foreign allies. In the past decade, U.S. military forces acting under orders of the President of the United States invaded Grenada, attacked Libya with the assistance of the United Kingdom and its Prime Minister, invaded Panama and with some participation by the United Nations and a number of its members inflicted enormous casualties and destruction on Iraq. Damages sought by injured private parties and estates of civilians who were killed have been denied by the U.S. following each episode. Each military action

resulted in many civilian deaths, personal injuries and great damage to private property. At this time, the President of the United States is asserting that he has the power without Congressional, or United Nations authority to use military force. He has threatened Iraq, Cuba, North Korea, Pakistan and other countries including Libya, with miltary assault this year.

The United States invaded Panama, seized its head of state by force in January 1989 and placed him on trial in the United States. The United States is exacting monetary damages from seized assets of Iraq and is demanding without judicial determination of liability that Libya pay damages for deaths of 270 persons killed in 1988 on Pan American Airways Flight 103. It has denied Iranian victims damages for the admitted

destruction of Iran Air Flight 655 over the Persian gulf by U.S. Naval gunfire in 1988 which resulted in 290 deaths, including 66 children.

To the first question presented by this case, the United States Courts told the world that U.S. sovereignty is supreme and peoples of the world have no recourse in the U.S. Courts for deaths and injuries they may suffer from U.S. military acts however criminal, or illegal they may be. No U.S. court heretofore ever asserted sovereign immunity as a bar to recovery for damages arising from war crimes, or other criminal acts. The second and remaining question is whether the federal judiciary will tell the American people and their legal profession that if anyone dares challenge in Court U.S. military actions intended to kill innocent civilians they

will be punished by potentially ruinous monetary sanctions. Before this case, no court of the United States ever imposed sanctions on lawyers who filed suit for persons killed and injured by war crimes.

The complaint was based on allegations of unprecedented criminal acts by the President of the United States, the Prime Minister of the United Kingdom and officials and military officers of the United States. Defendants' motions to dismiss the complaint before trial were granted. The District Court denied motions for sanctions by both the United States and the United Kingdom.

The case arose from a U.S. aerial attack on Libya. At about 2 a.m. on April 15, 1986 United States Air Force and Navy aircraft carried out a surprise bombing attack on the cities of Tripoli

and Benghazi in Libya. Air Force F-111's flew from U.S. bases in England over the Atlantic, west of France, Spain and Portugal, through the Straits of Gibraltar and across the Mediterranean while more than 70 Navy planes flew from aircraft carriers in the Mediterranean to attack sleeping cities.

The purpose of the attack, as alleged in the complaint, was to assassinate Muammar Qaddafi, the head of state of Libya, and to terrorize Libyans by killing civilians to encourage his overthrow. The bombing resulted in scores of civilian deaths and injuries in Tripoli and Benghazi.

The secrecy, surprise nature, destruction of civilian areas, deaths of civilians and intent to assassinate Qaddafi were widely reported in the U.S. media and in books by nationally known

reporters for the New York Times, the Washington Post, the Wall Street Journal, and C.B.S. News, among others. See e.g. "Target Qaddafi", Seymour M. Hersh, New York Times Magazine, February 22, 1987; Veil: The Secret Wars of the CIA, by Bob Woodward, Pocket Books, 1987; Best Laid Plans, by David C. Martin and John Walcott, Harper and Row, 1988.

Margaret Thatcher, Prime Minister of the United Kingdom, gave permission for the use of U.S. bases in the United Kingdom, personally approved the targets knowing and having stated the attack was illegal and would kill civilians. A45. See also Reagan Raiders, Newsweek, April 28, 1986 at 26. Other nations refused requests from the U.S. to participate in the attack or permit aircraft to fly over their territory for the purpose.

B. Law Supporting The Complaint Was Exhaustively Researched And The Complaint Was Carefully Prepared.

There was no claim that the complaint was not completely professional and competent. The facts were thoroughly investigated. Three trips to Libya and European hospitals were made. Individual files were prepared on each of the 355 plaintiffs containing data of their background and injuries. There was no claim that the allegations were not well grounded in fact.

The law supporting the complaint was exhaustively briefed and presented to the District Court. Lengthy affidavits of two professors, experts on international law were filed in support of the international and military law bases for the complaint. Substantial authority was presented supporting each legal basis for

the complaint.

The decisions below are the first by any Court of the United States holding that the President can order an assassination and the killing of civilians in foreign cities during peacetime by illegal surprise military bombardment and persons killed or injured as a result have no remedy in U.S. Courts. They are the first to hold U.S. sovereign immunity bars any recovery of damages by victims of war crimes. They are the first to sanction lawyers who filed such claims.

Written claims by or on behalf of each of the plaintiffs were filed in April, May and June, 1987 with the Office of the White House and the United States Department of Defense in accordance with the prescribed procedures for the filing of claims under the Federal Tort Claims

Act. The Department of Defense referred the claims that were filed with it to the Department of the Air Force. The Air Force considered the claims under the Foreign Claims Act, 10 U.S.C. 2734, and denied them as such by letter dated October 16, 1987. No denial or notice of any other action taken on the claims filed with the Office of the White House was received.

Defendants moved for dismissal of the actions before answer. The District Court froze discovery and all further activity in the case and set a briefing schedule on the motions to dismiss. The parties filed extensive briefs on the issues. Oral argument was heard on December 16, 1988. On December 23, 1988, the District Court dismissed all the claims in a seven page memorandum and order. A17.

The District Court held the United States had not waived sovereign immunity. It disposed of the Federal Tort Claims Act, Alien Tort Claims Act, Foreign Claims Act, and RICO with one sentence each, all in a single footnote. A24. It held the President, acting in his capacity as commander in Chief under Article II, section 2 of the Constitution, had absolute immunity, citing only Nixon v. Fitzgerald, 475 U.S. 731 (1982). As to all other U.S. defendants from the Secretary of Defense to the bomber pilots, it held "each acted, as duty required, in accordance with the orders of the commander in Chief or a superior officer" and is "entitled to immunity from this suit, whether immunity is classified as absolute or qualified, and whatever the origins of the rights plaintiffs claim may have been

violated" citing only Harlow v. Fitzgerald, 457 U.S. 800 (1982). A26.

The District Court held the act of state doctrine compelled dismissal of the United Kingdom and that the State Department suggestion of immunity for Mrs. Thatcher was conclusive.

The District Court stated in a footnote that it was bound by the rule that all well-pleaded factual allegations of the complaint must be taken as true, that plaintiffs were entitled to all favorable inferences therefrom and that the complaint may not be dismissed unless it appeared beyond doubt that plaintiffs could prove no set of facts which would entitle them to relief. A19. It nevertheless found in direct contradiction of the complaint that the President acted in his capacity as commander in chief and pursuant to

Article 51 of the United Nations Charter to protect U.S. lives and property against acts of terrorism.

The District Court did not address any allegation of violations of legal rights, made no effort to analyze international law authorities presented in support of petitioners' claims and ignored important constitutional claims alleged, extensively briefed and argued including major cases from before Little v. Barreme, 2 Cranch 170 (1804) and after Bivens v. Six Unknown Agents 403 U.S. 388 (1971).

Claims for sanctions by the defendants were denied by the District Court on the grounds that the case was not so much frivolous, as audacious, adding U.S. courts should serve in some respects as a forum for public statement of protest.

C. The Complaint Against The United Kingdom And Mr. Thatcher Was Warranted By Existing Law And A Good Faith Argument For The Extension, Modification Or Reversal Of Existing Law

The complaint was supported by a number of existing legal principles and authorities, both specific and general in their holdings. Among these are:

1. An Existing Decision Of A U.S. Court Of Appeals Supported The Complaint When It Was Filed

Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 421 (2nd Cir. 1987), specifically authorized suit under the Alien Tort Statute, 28 U.S.C. 1350, against a foreign sovereign, Argentina, for damages arising from its attack on a neutral ship during the Falkland-Malvinas conflict between Argentine and the United Kingdom. It was not reversed by the Supreme Court until

after the decision of the District Court in this case.

2. The FSIA Does Not Confer Immunity On Mrs. Thatcher

Argentine Republic v. Amerada Hess Corp., 488 U.S. 428 (1989), decided after the decision of the District Court held in sweeping terms that the Foreign Sovereign Immunities Act ("FSIA") is the exclusive source of law for determining sovereign immunity of foreign governments in U.S. courts. It specifically held that the liability of individual and other defendants which are not foreign states themselves, under the Alien Tort Statute remains the same after the passage of the FSIA as it was before the enactment. 488 U.S. at 438. Amerada Hess, therefore, provides no basis for

the assertion of immunity to claims against Mrs. Thatcher under the Alien Tort Statute. Cases like Santissima Trinidad, 20 U.S. (7 Wheat) 283 (1822) remain authority for Mrs. Thatcher's liability for damages under the existing law.

3. The FSIA Did Not Grant Immunity For War Crimes Proscribed By Prior International Law

The FSIA expressly provides that the immunity of a foreign state shall be subject "to existing international agreements to which the United States is a party at the time of enactment of this Act." 28 U.S.C. §1604. These international agreements together with the body of custumary international law constitute clear and important waivers of sovereign immunity on which petitioners relied. In view of United States

participation in the United Nations, its ratification of the Hague and Geneva Conventions and the Nuremberg Charter, among others, it is clear that Congress did not intend in the FSIA to immunize governments from accountability theretofore existing for international crimes, including war crimes, in violation of the terms of U.S. treaty obligations. Consistent construction of the application of Congressional legislation to pre-existing rights under treaties and international law require deference to those authorities in the absence of the clearest expression to the contrary. See Murray v. The Charming Betsy, 6 U.S. 64 (2 Cranch) (1804); U.S. v. PLO, 695 F.Supp. 1456, 1464-65, 1468-71 (S.D.N.Y. 1988).

The United States cannot sustain claims of sovereign immunity in U.S.

courts for itself, its President, officials and officers, or confer immunity on the United Kingdom and its Prime Minister who acted in concert with the United States, against claimed violations of international laws, including crimes against peace, crimes against humanity and war crimes. No Court of the United States has ever held there can be immunity against such claims. Nor has any case presented the issue to a federal court on such clear, uncontestable facts in such inescapable circumstances. If a government can declare itself, its agents, accomplices and co-conspirators, immune from all liability for violations of international law, including such crimes, then all hope for peace through international law is destroyed.

Customary international law is a

part of the domestic law of the United States. Treaties and executive agreements are a part of the Supreme Law of the land. See, Article VI, Constitution of the United States; the Paquette Habana And The Lola, 175 U.S. 677 (1900), United States v. Belmont, 301 U.S. 324 (1937); United States v. Pink, 315 U.S. 203 (1942). International law operates directly under the Alien Tort Statute, and indirectly under 28 U.S.C. 1331 by virtue of Article VI of the Constitution and the incorporation of international law into federal common law.

In the midst of the Second World War, the Supreme Court addressed the justiciable nature of the laws and customs of warfare in United States courts:

From the very beginning of its

> history this court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals.

Ex Parte Quirin, 317 U.S. 1 (1942), at 27-28.

This Court held in In re Yamashita, 327 U.S. 1, 8 (1945) that Congress had adopted "the system of military common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts, and as further defined and supplemented by the Hague Convention. See, The Nuremberg Trial, 6 F.R.D. 69, 130 (1946).

Amerada Hess held the Geneva Convention on the High Seas and the Pan American Maritime Neutrality Convention do not create exceptions to the FSIA on the facts of that case. It did not address liability created by the large

body of international agreements relied on by petitioners, as alleged for example, in paragraph 3 of the complaint. A33.

4. The United Kingdom And Margaret Thatcher Were Not Protected By Any Doctrine Of Immunity Under Existing Law

The District Court held the Act of State doctrine compelled dismissal of the complaint as to the United Kingdom, A20-21. Finding the complaint charges "Britain's complicity in an illicit act of war committed by the United States", the District Court held such conduct constitutes "an archetypal act of state." It cited two cases, Underhill v. Hernandez, 168 U.S. 250 (1897) and Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), to support its action. Since the denial of a rehearing in the Court of Appeals, this Court has

made important clarifications in the act of state doctrine in W.S. Kirkpatrick, Inc. v. Environmental Tectonics Corporation International, 493 U.S.400 (1990). Kirkpatrick confirms that the act of state doctrine is inapplicable here.

Kirkpatrick unanimously held, at 409:

> ...Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them. The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid.

The complaint in this case does not ask or require a court of the United States to declare invalid any official act by the United Kingdom taken within its own territory. At issue is not the validity of

the United Kingdom's grant of permission to use its territory, but its complicity in the attack by the United States against Libya. Both of the British defendants are charged in the complaint, with conspiring, aiding and abetting and acting in concert with their codefendants and others with respect to a range of actions in the United States and elsewhere culminating in the bombing of Libya. The district court is not required to address, or decide, and the outcome of the claim against the United Kingdom and Mrs. Thatcher does not rest on, a declaration or finding that any official act of the United Kingdom within its jurisdiction was invalid and thus ineffective as a rule of decision for the Courts of this country, any more than the claim in Kirkpatrick rested on the legality of the Nigerian contract. As petitioners had argued in their opposition below, "the

foreseeable, actual and intended consequences of the actions occurred and were applicable in Libya and not the United Kingdom...the acts here resulted in destruction of property in Libya and deaths and personal injuries there." Citing Restatement of Law Third: The Foreign Relations Law of the United States (1987)secs. 443-44, pp. 366-89. Cf. Letelier v. Republic of Chile, 488 F. Supp. 665 (D.D.C. 1980).

The acts of Mrs. Thatcher do not resemble in any way archetypal acts of state. These are usually a taking or expropriation by a foreign state of property within its own territories or other acts of a governmental character done by a foreign state within its own territory and applicable there. See Restatement, supra, §443. It would totally distort the nature and purpose of the acts of Mrs. Thatcher to

characterize them as being confined to the territory of the United Kingdom.

Further, there is no act of state immunity for the kind of violations of international law here presented. In Rose v. Himely, 8 U.S. (Cranch) 240 (1808), Chief Justice Marshall held U.S. Courts are required to examine the validity of a foreign court's action under the law of nations, an issue not even raised in Underhill v. Hernandez, supra. See, Restatement, supra, §443, Comment c, p. 370:

> ...A claim arising out of an alleged violation of fundamental rights - for instance, a claim on behalf of a victim of torture or genocide - would (if otherwise sustainable) probably not be defeated by the act of state doctrine, since the accepted international law of human rights is well established and contemplates external scrutiny of such acts. See §§701-703...

See also Liu v. The Republic of China, 892 F.2d 1419, 1431-34 (9th Cir. 1989); Forti v. Suarez-Mason, 672 F.Supp. 1531, 1544-47

(N.D.Cal. 1987). For a recent review of the act of state doctrine, written before but acknowledging Kirkpatrick, supra, finding "...no issue is in more need of coherent analysis than the act of state doctrine...", see, Leigh, Sabbatino's Silver Anniversary and the Restatement: No Cause for Celebration, 24 Int'l.Lawyer 1 (1990).

As Kirkpatrick points out, 493 U.S. at 409, even in cases where the act of state is technically available, the judiciary may consider whether it should nevertheless not be recognized. See also, Banco Nacional de Cuba v. Sabbatino, supra.

As to Mrs. Thatcher, who was the political head of government, not the sovereign head of state, after finding the Department of State had "made the requisite certification and determination to allow the immunity" for her, after the complaint was filed, the District Court held it "must

accept them as conclusive". It cited two admiralty cases involving in rem proceedings in U.S. courts against ships owned by foreign governments without more. Both cases pre date the Foreign Sovereign Immunities Act. Ex parte Republic of Peru, 318 U.S. 578, 589 (1943); Republic of Mexico v. Hoffman, 324 U.S. 30 (1945).

There is no basis in law for a holding that the Department of State by its suggestion can confer immunity on Mrs. Thatcher precluding the courts of the United States from consideration of the immunity issue. Since the act of state doctrine and foreign sovereign immunity are inapplicable as a matter of law as a defense here for the United Kingdom, the Department of State has no power to mandate immunity for the head of that government on the same claims. "The scope of [head of state] immunity is in an amorphous and undeveloped state...'[S]ince

there is no agreement on the degree of immunity that attaches to the status of head of state, there is no standard that can be viewed as customary international law.'" In re Doe, 860 F.2d 40, 44 (2d Cir. 1988) (Considering head of state immunity from prosecution of Ferdinand and Imelda Marcos.)

5. The United Kingdom And Margaret Thatcher Could Not Invoke Immunity Principles In U.S. Courts For Criminal Acts Committed In Complicity With The United States For Which The United States Was Not Immune

The United States cannot grant immunity which it does not have itself to a foreign government or official bind which the Courts of the United States must accept for violations of international law, where as here the foreign official and her nation acted in concert with the United States.

The holding in Amerada Hess that the Foreign Sovereign Immunities Act is the

exclusive measure of the immunity of foreign governments in U.S. courts did not contemplate a case in which that foreign government acted in complicity with the United States to commit international crimes of extraordinary dimension, as well as crimes under the laws of the United States. The FSIA was concerned overwhelmingly with international commercial activity by foreign governments.

The United States and its agents were the principal actors and defendants here. If the U.S. is liable its co-conspirators must also be accountable in the same lawsuit. Application of any doctrine of immunity to protect the United Kingdom from responsibility for such crimes when the United States has no such immunity itself, and both nations have acted in concert, would subvert the integrity of the rule of law. It would place diplomatic amenities

above international law, accountability for war crimes and the protection of human rights. It would empower a wrongdoer to absolve his accomplice. The rule in Amerada Hess is limited to cases in which the United States can lawfully confer immunity. Unquestioning judicial acceptance of immunity cannot be compelled to cover crimes by government agents and protect accomplices.

Petitioners asserted claims and cited extensive existing authority holding the United States and its agents liable for deaths and injuries from the bombing of Libya.

Early in our constitutional history, Chief Justice Marshall wrote,

> "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."

Marbury v. Madison, 1 Cranch 137, 163 (1803).

The following year, Chief Justice Marshall addressed the right of aliens to recover damages for alleged injuries caused by the illegal seizure on order of the President of their ship, the Flying Fish, during the Congressional wartime suspension of intercourse between France and the United States. Little v. Barreme, 2 Cranch 170, 179 (1804).

The Chief Justice for a unanimous Supreme Court held that a commander of a ship of war of the United States in obeying instructions from the President of the United States acts at his peril. If those instructions are not strictly warranted by law, he is answerable in damages to any person injured by their execution. Damages were assessed for the loss of the use of the ships and cargo.

Nearly one hundred fifty years later, in his concurring opinion in Youngstown Steel and Tube Co. v. Sawyer, 343 U.S. 579, at 661 (1951), Justice Clark, referring to Little v. Barreme wrote, "I know of no subsequent holding of this Court to the contrary." Butz v. Economou, 438 U.S. 478 (1978) confirmed the absence of a contrary holding twenty-seven years later. Until this day, there has been none.

In United States v. Lee, 106 U.S. 196, at 220 (1982) this Court wrote in a case restoring property to the family of the military leader of the rebellion in our bloodiest American war

> "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance, with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law and are bound to obey it."

Id. at 220.

In the famous Spanish-American War cases, The Paquete Habana and The Lola, 175 U.S. 677 (1900) the United States Supreme Court held that two Spanish flag fishing boats sailing out of Havana, seized by the U.S. Navy during a declared war, were illegally taken under international law which governed. The Court after an exhaustive recitation of international authority held:

> "...it is an established rule of international law, founded on considerations of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent states, that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war."

The Paquete Habana, supra, at 708.

The United States was ordered to give the proceeds of the sales of the vessels and cargo to the claimants and pay damages and

costs.

During the Korean War, with hundreds of thousands of U.S. soldiers serving in Korea, the Supreme Court held the President had no power to seize U.S. steel mills he said were necessary for the war effort which were threatened with labor strikes. The Court refused to sustain the President's order as an exercise of his military power as Commander in Chief of the Armed Forces. Youngstown Steel and Tube Co. v. Sawyer, 343 U.S. 579 (1952).

By its plain words, the Constitution extends the "judicial Power...to controversies to which the United States shall be a Party..." Article III, Section 2. In early cases, military officers acting on the order of the President were accountable in damages for their misdeeds. See, Little v. Barreme, supra; United States v. Peters, 9 U.S. 115 (1809); Meigs v.

McLungs Lessee, 9 Cranch 11 (1815); See, Osborn v. Bank of the United States, 9 Wheat. 738 (1824); Mitchell v. Harmony, 54 U.S. 115, at 137

In Laird v. Tatum, 408 U.S. 1, at 15-16 (1972) Chief Justice Burger, writing for the majority in a case rejecting federal liability for surveillance of civilians during the Vietnam War, observed:

> Indeed, when presented with claims of judicially cognizable injury resulting from military intrusion into the civilian sector, federal courts are fully empowered to consider claims of those asserting such injury; there is nothing in our Nation's history or in this Court's decided cases, including our holding today, that can properly be seen as giving any indication that actual or threatened injury by reason of unlawful activities of the military would go unnoticed or unremedied.

Even damage suits brought by military personnel against their superiors for injuries incident to their military service which necessarily concern questions of

military discipline have won the support of four Justices where the conduct causing the injury, such as the surreptitious administration of LSD for testing, is unconscionable. See the dissenting opinion of Justice O'Connor who, after discussing the Nuremberg medical testing cases wrote,

> "...the very least that society can do is to see that the victims are compensated ... by the perpetrators ... I would permit James Stanley's Bivens action to go forward."

United States v. Stanley, 483 U.S. 669, at 709-10 (1987).

In addition to these authorities establishing liability where the executive acted illegally and in excess of its authority, petitioners relied below on Bivens v. Six Unknown Agents, 403 U.S. 388 (1971). The Courts never addressed the issue. The viability of plaintiffs' Bivens claims ought to be fully addressed and decided by the Courts before they

arbitrarily impose debilitating sanctions.

Here the acts ordered by the President were not acts the Constitution empowered him to order, were not authorized by any Congressional legislation, and violated criminal laws and civil rights of all jurisdictions involved.

Butz v. Economou, supra, held that in a suit for damages against the Secretary of Agriculture and others for alleged retaliation against plaintiff employees for their criticism of the Department, there is only qualified immunity even for discretionary acts within the scope of the Secretary's authority against a claim of violation of constitutional rights.

The Court reached the same conclusion where Governor Rhodes, commander in chief of Ohio, and others were sued for damages arising from rifle fire by the Ohio National Guard at Kent State University which killed

four students and injured others. Scheuer v. Rhodes, 416 U.S. 232 (1974). See also Gilligan v. Morgan, 413 U.S. 1, 11-12 (1973).

In Nixon v. Fitzgerald, 457 U.S. 731 (1982) the U.S. Supreme Court, by a 5 to 4 vote, in a case involving the employment rights of a federal management analyst held only that the President was entitled to absolute immunity from liability predicated on his official acts within the perimeter of his responsibility. Attempted assassination and intentional killing of civilians is not within the perimeter of the President's responsibility. Justice Blackmun observed in his dissent,

> "...the Court leaves unanswered the unanswerable argument that no man, not even the President of the United States, is absolutely and fully above the law." Id. at 797

Compelling existing authority and

argument was presented to demonstrate that the United States waived its immunity under the Federal Tort Claims Act. Among the cases cited addressing the discretionary function exception, 28 U.S.C. 2680(a) were Berkovitz v. U.S., 486U.S. 531, 541, citing Westfall v. Erwin, 484 U.S. 292, 296-97 (1988) (the judicial doctrine of official immunity does not provide absolute immunity to Government employees for torts committed in the scope of their employment but would have to be determined on a case-by-case basis) id. at 299, see U.S. v. Smith, 499 U.S. ___, 113 L.Ed.2d 134, 142 (1991)); Hatahley v. U.S., 351 U.S. 173, 180-81 (1956); Red Lake Band of Chippewa Indians v. U.S., 800 F.2d 1187, 1196, n.4 at 1197 (D.C. Cir. 1986); Birnbaum v. U.S., 588 F.2d 319, 329 (2d Cir. 1978). Among cases cited addressin the combatant exception, 28 U.S.C. 2680(j), was Vogelaar

v. U.S., 665 F.Supp. 1295 (E.D. Mich. 1987). Cases addressing and the foreign country exception, 28 U.S.C. 2680(k) included Beattie v. U.S., 756 F.2d 91, 96 (D.C. Cir. 1984); Sami v. U.S., 617 F.2d 755, 761-63 (D.C. Cir. 1979),

> "No case to our knowledge has held the United States exempt from liability for acts or omissions occurring here which have their operative effect in another country. Indeed, to the extent the decided cases address the issue at all, they have come to a contrary conclusion." 617 F.2d at 762

D. The Imposition Of Sanctions In This Case Will Dangerously Deter Assertions Of Violations Of Fundamental Rights In The Most Vital Area Of Human Need For A Rule Of Law.

Inherent in the idea of constitutional government and the rule of law is the principle that agents of "government may act only as the Constitution authorizes, whether the actions in question are foreign, or domestic." See, Reid v. Covert, 354 U.S.

1, 6 (1957); United States v. Verduzo-Urdiquez, 58 U.S.L.W. 4263, 4268 (1990) (Kennedy, J. concurring.) The Courts below denied petitioners "[T]he very essence of civil liberty [which] certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." Marbury v. Madison, 1 Cranch at 163. See, Franklin v. Gwinnett County Public Schools, 503 U.S.____, 117 L.Ed.2d 208, 216 (1992) (applying the traditional presumption in favor of the availability of any appropriate relief for violation of a federal right in concluding that a money damages remedy is available in a sex discrimination action under Title IX of the Education Amendments of 1972).

That right to claim the protection of the laws was denied though many deaths and serious injuries occurred as a result of

deliberate criminal military actions. The threat to the rule of law was compounded by the imposition of monetary sanctions on lawyers who prepared and filed the claims. The sanctions were imposed by the Court of Appeals, which reversed the District Court on the question of sanctions in the face of existing law which clearly warranted the claim. The Court of Appeals summarily affirmed the dismissal though on different grounds than those relied on by the District Court with no analysis of the many authorities and theories presented. The plaintiffs did not have their day in Court. No serious attempt was made to consider then authority and claims of right. An offended panel brushed the claims aside and punished the lawyers for audacity.

Precedent for the relief sought here far exceeds the authority that was available to plaintiffs in Brown v. Board

of Education. Sanctions in such cases can have catastrophic effects on protection of our most precious rights.

Dismissals on the grounds of sovereign immunity and foreign sovereign immunity in the face of allegations of war crimes is unprecedented in the United States. It is a singularly unfortunate ground for a nation claiming adherence to the rule of law and commitment to democratic institutions. To punish lawyers for asserting the claims with monetary sanctions is little different from countries that imprison lawyers for alleging their government committed crimes. The power to sanction, like the power to tax, involves the power to destroy. To impose sanctions in the face of an obviously sincere and exhaustive effort to present legal history, analysis and existing authority supporting the claims

and by construing words of the District Court contrary to that Court's own conclusion,

usurping as well its discretion, all without judicial analysis of the legal merits of the claim, and by summary affirmance, reveals such an arbitrary and punitive state of mind by the Court of Appeals panel as to threaten, if sustained, any party or counsel that would dare seek redress in U.S. Courts for the most grievous and criminal injury by an unbridled military. To be sure the questions of law raised by the complaint were unprecedented, complex, obscure, and developing, but the acts of the United States which gave rise to them were also unprecedented. The Court of Appeals panel was offended by the claims and used Rules 11 and 38 as its latter day penalty for lese majeste. To avoid great damage to the

rule of law from the deterrent effect of these sanctions, they must be set aside. See, D'Amato, The Impositions of the Sanctions for Claims Arising from the U.S. Air Raid on Libya, 84 Amer.J.Int.Law 705 (1990).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 24, 1992

APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed April 10, 1992

No. 91-5107

FARAG M. MOHAMMED SALTANY, *et al.*,
APPELLANTS

v.

GEORGE BUSH, PRESIDENT OF THE UNITED STATES,* *et al.*,
APPELLEES

Appeal from the United States District Court
for the District of Columbia

(Civil Action No. 88-981)

Before WALD, EDWARDS and D.H. GINSBURG, *Circuit Judges.*

Judgment for the Court filed PER CURIAM.

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*President Bush is substituted for former President Reagan, insofar as the latter is sued in his official capacity. *See* FED. R. APP. P. 43(c).

JUDGMENT

This cause came to be heard on appeal from a decision by the District Court. The issues have been accorded full consideration by the Court and occasion no need for a published opinion. *See* D.C. CIR. R. 14(c).

Counsel challenge the award of Rule 11 and Rule 38 sanctions against them, as directed by a previous panel. The law of the case doctrine bars this challenge. *See, e.g., Melong v. Micronesian Claims Comm'n,* 643 F.2d 10, 17 (D.C. Cir. 1980). We see no clear error combined with manifest injustice, nor does *Cooter & Gell v. Hartmarx Corp.,* 110 S. Ct. 2447 (1990), constitute intervening law on the Rule 11 issue. The prior panel determined that the District Court had found a Rule 11 violation, *see Saltany v. Reagan,* 886 F.2d 438, 440 (D.C. Cir. 1989), *cert. denied,* 495 U.S. 932 (1990), and there is no basis under *Cooter* or any other precedent for us to reconsider this determination. Moreover, *Cooter* makes clear that sanctions must be imposed once a violation is found. *See* 110 S. Ct. at 2454, 2460.

Counsel also argue for a nonmonetary Rule 11 sanction, but the District Court considered this possibility and reasonably exercised its discretion to impose a fine instead.

Accordingly, it is hereby ORDERED and ADJUDGED that the decision is affirmed.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. CIR. R. 15.

PER CURIAM
For the Court:

Constance L. Dupré
Clerk

A separate dissenting statement filed by *Circuit Judge* WALD is attached.

WALD, *Circuit Judge,* dissenting: I regretfully dissent from the majority's affirmance of the district court's imposition of Rule 11 sanctions against plaintiffs' counsel. The district court had originally denied appellees' motion for Rule 11 sanctions, concluding that "[i]t cannot . . . be said that the case is frivolous so much as it is audacious." *Saltany v. Reagan,* 702 F. Supp. 319, 322 (D.D.C. 1988).

On the first appeal, this court nonetheless concluded that, when the district judge commented in his opinion that "[t]he case offered no hope whatsoever of success, and plaintiffs' attorneys surely knew it," *id.,* he "found, in substance if not in terms, that plaintiffs' counsel had violated Rule 11; yet the court did not impose a sanction." *Saltany v. Reagan,* 886 F.2d 438, 440 (D.C. Cir. 1989) (per curiam), *cert. denied,* 495 U.S. 932 (1990). The prior panel remanded to the district court for the "imposition of an appropriate sanction." *Id.* On remand, the district judge not unreasonably interpreted the remand order "as an unequivocal direction to it" to impose Rule 11 sanctions, *see* Memorandum and Order, No. 88-981 (D.D.C. filed Mar. 14, 1991) at 1-2, and he ordered plaintiffs' counsel to pay $10,000 each to the British appellees.

Under the "law of the case" doctrine, a decision on an issue of law made at one stage of a case ordinarily becomes a binding precedent to be followed in successive stages of the same case. However, this doctrine "is not an inexorable command that rigidly binds a court to its former decisions but rather is an expression of good sense and wise judicial practice." *Carpa, Inc. v. Ward Foods, Inc.,* 567 F.2d 1316, 1320 (5th Cir. 1978). As this court has stated on several occasions, "[t]o warrant divergence from the law of the case, a court must not only be convinced that its earlier decision was erroneous; it must also be satisfied that adherence to the law of the case will work a grave injustice." *Melong v. Micronesian Claims Comm'n,* 643 F.2d 10, 17 (D.C. Cir. 1980); *Laffey v. Northwest Airlines, Inc.,* 642 F.2d 578, 585 (D.C. Cir. 1980); *see also Browning v. Navarro,* 887 F.2d 553, 556 (5th Cir. 1989) ("We have the discretion to ignore a previous deci-

sion if substantially different evidence has been presented, there has been an intervening change in the law, or the prior decision was clearly erroneous and it would work a manifest injustice.").

Despite the extremely high threshold that any departure from past holdings in the same case must meet, I feel one is justified here. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990), decided after the first appeal in this case, does represent an "intervening change in the law" to the extent that it establishes a "clearly erroneous" standard rather than a *de novo* review standard for a review of a decision to impose (or not to impose) Rule 11 sanctions. Although the prior panel opinion did not expressly identify its standard in reviewing the district judge's denial of Rule 11 sanctions, in my view, it did not treat his express decision not to impose sanctions with the required deference by finding that he had ruled on the factual predicates of Rule 11 but erred in not properly applying the law to those findings.

In order to find a violation of Rule 11, the district judge must conclude that, to the best of counsel's knowledge, information, and belief formed after reasonable inquiry, the pleading was neither "well grounded in fact" nor "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law," or that the pleading was "interposed for an[ ] improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." FED. R. CIV. P. 11. The district judge here explicitly declined to make any such finding. His remark that the case "offered no hope whatsoever of success, and plaintiffs' attorneys surely knew it" is not an appropriate substitute for the conclusions required by Rule 11. Even if the district judge's conclusion that appellants' counsel knew that they had no hope of prevailing was correct—a "fact" put in some doubt both by the enormous time and energy expended by counsel in preparation of their case and the expert opinions they were able to assemble on behalf of the legitimacy of their clients' cause of action—that con-

clusion is still not equivalent to a finding that counsel did not have a "good faith argument for the extension, modification, or reversal of existing law." Surely the propriety of Rule 11 sanctions should not depend on the degree of optimism with which counsel approach litigation. The prior panel's conclusion that the district judge had found "in substance" that the appellants' counsel had violated Rule 11 was itself, in my view, "clearly erroneous," and the sanctions imposed on the basis of that substituted finding have created a "manifest injustice."

The effect of reaching beyond a district judge's clear exercise of his discretion not to impose Rule 11 sanctions and not to make the specific fact findings required by Rule 11 by reconstructing that decision out of side comments about the likelihood of plaintiffs' prevailing (and counsels' knowledge thereof) cannot but chill well-founded future suits, whose time in the law may not yet have come, but whose value in exposing abuses and educating courts and the public is substantial. Cognizant that the district court had no realistic choice but to impose sanctions on remand, I dissent from the result which our prior decision required of him.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-5051 September Term, 1988

Farag M. Mohammed Saltany, et al.,

Appellants

v.

Ronald W. Reagan, President of U.S., et al.

And consolidated cases

BEFORE: Buckley, D.H. Ginsburg and Sentelle, Circuit Judges

O R D E R

Upon consideration of the United States' motion for summary affirmance, the United Kingdom's and Prime Minister Thatcher's motion for summary affirmance in part and for summary reversal in part, and an award of damages and costs, and the opposition and replies thereto, it is

ORDERED that the district court's memorandum and order filed December 23, 1988 granting defendants' motions to

dismiss, be summarily affirmed substantially for the reasons stated therein. It is

FURTHER ORDERED that the motion for summary reversal in part, and an award of damages and costs be granted for the reasons stated in the accompanying per curiam opinion.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 15.

Per Curiam

[Stamped:]
FILED SEP 29, 1989
Constance L. Dupre
Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Decided September 29, 1989

Nos. 89-5051, 89-5052 & 89-5053

FARAG M. MOHAMMED SALTANY, *et al.*, APPELLANTS

MUNIEM MOHAMED IBRAHEIM AL-MSHIRGI, *et al.*

v.

RONALD W. REAGAN, PRESIDENT OF U.S., *et al.*

Appeals from the United States District Court
for the District of Columbia
(D.C. Civil Action No. 88-00981)

On Motion for Summary Reversal

Mark R. Joelson, *Joseph P. Griffin*, and *Mark N. Bravin* were on the pleadings for Thatcher, *et al.*, appel-

lants in No. 89-5053 and appellees in Nos. 89-5051 & 89-5052.

Ramsey Clark and *Lawrence W. Schilling* were on the pleadings for Saltany, *et al.*, appellants in No. 89-5051 and appellees in Nos. 89-5052 & 89-5053.

Larry L. Gregg and *Barbara L. Herwig* were on the pleadings for Reagan, *et al.*, appellants in No. 89-5052 and appellees in Nos. 89-5051 & 89-5053.

Before: BUCKLEY, D.H. GINSBURG, and SENTELLE, *Circuit Judges.*

Opinion PER CURIAM.

PER CURIAM: On April 13, 1988, fifty-five Libyan citizens and residents filed suit in the district court seeking damages for injuries, death, and property loss sustained in the 1986 United States air strike on Libya. Substantial damages were sought from the United States, President Reagan, senior civilian and military officials, and from the United Kingdom and Prime Minister Thatcher as well. Plaintiffs sought to hold the British defendants liable on the basis that the Prime Minister gave the United States permission to use British air bases in the air strike. Plaintiffs asserted claims under the Federal Tort Claims Act, 28 U.S.C. § 2671, *et seq.*, the Foreign Claims Act, 10 U.S.C. § 2734, the Alien Tort Claims Act, 28 U.S.C. § 1350, the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. § 1961, *et seq.*, and various constitutional and common law theories, including the "tort law of Libya."

Upon motions, the district court dismissed plaintiffs' claims as to all defendants. *See Saltany v. Reagan*, 702 F. Supp. 319 (D.D.C. 1988). Plaintiffs appealed and defendants have moved this court for summary affirmance. By separate order this date, we affirm the decision dismissing plaintiffs' case.

Both the United States and the British defendants also moved the district court for sanctions pursuant to Federal Rule of Civil Procedure 11, on the grounds that plaintiffs abused the judicial process and needlessly imposed upon defendants the cost of defending against an action not supported by existing law or by any good faith argument for the extension, modification, or reversal of existing law. The district court found that plaintiffs' counsel "surely knew" that the case "offered no hope whatsoever of success," but it declined to impose sanctions in the interest of keeping the courthouse door open as a forum for suits "brought as a public statement of protest of Presidential action with which counsel (and, to be sure, their clients) were in profound disagreement." *Id.* at 322.

The United Kingdom has cross-appealed from, and seeks summary reversal of, the decision denying sanctions. Additionally, the United Kingdom seeks attorneys' fees and costs, pursuant to both Federal Rule of Appellate Procedure 38 and 28 U.S.C. § 1927, for the costs of defending against a frivolous appeal. For the reasons stated below, we reverse and remand the district court decision with regard to the Rule 11 sanction, and grant the United Kingdom's motion for attorneys' fees and costs on appeal pursuant to Rule 38.

I. Federal Rule of Civil Procedure 11

The United Kingdom asserts that the district court erred in denying its Rule 11 motion for attorneys' fees and costs, relying upon the well established principle that the court must impose a sanction "once it has found a violation of the rule." *Weil v. Markowitz*, 829 F.2d 166, 171 (D.C. Cir. 1987) (footnote omitted); *Westmoreland v. CBS*, 770 F.2d 1168, 1174-75 (D.C. Cir. 1985). Thus, the question is whether the district court found, or should have found, that plaintiffs violated Rule 11. If so, then a sanction must be imposed.

Here, the district court observed that plaintiffs, citizens or residents of Libya, could not be "presumed to be familiar with the rules of law of the United States." *Saltany*, 702 F. Supp. at 322. The court noted, however, that "[i]t is otherwise . . . with their counsel. The case offered no hope whatsoever of success, and plaintiffs' attorneys surely knew it." *Id.*

The court thus found, in substance if not in terms, that plaintiffs' counsel had violated Rule 11; yet the court did not impose a sanction. Instead, the court went on to observe that because the "injuries for which the suit is brought are not insubstantial," the case is not "frivolous so much as it is audacious." *Id.* The seriousness of the injury, however, has no bearing upon whether a complaint is properly grounded in law and fact. We may agree with the district court that the suit is audacious—that is not sanctionable in itself—but, we do not see how filing a complaint that "plaintiffs' attorneys surely knew" had "no hope whatsoever of success" can be anything but a violation of Rule 11.

Nonetheless, surmising that the suit was brought as a public statement of protest, the district court opined that courts can "serve in some respects as a forum for making such statements, and should continue to do so." *Id.* (citing *Talamini v. Allstate Insurance Co.*, 470 U.S. 1067, 1070-71 (1985) (Stevens, J., concurring in dismissal of appeal)). We do not conceive it a proper function of a federal court to serve as a forum for "protests," to the detriment of parties with serious disputes waiting to be heard. In any event, reliance upon *Talamini* was inappropriate. That opinion, representing the views of Justice Stevens and three other justices, argued in opposition to awarding sanctions against an attorney who had pursued an unmeritorious application for review in an otherwise unremarkable unfair trade practices action. It in no way speaks to the use of the courts as any sort of political or protest forum. Whether punitive sanctions

should be imposed for invoking the judicial process is properly fit into the equation when considering whether a Rule 11 violation has occurred. Here, the district court had already determined in effect that a violation had occurred. Therefore, we grant the United Kingdom's motion for summary reversal and remand the matter to the district court for imposition of an appropriate sanction.

II. Federal Rule of Appellate Procedure 38

The United Kingdom (with the support of the United States) seeks to recover the attorneys' fees and costs it incurred by reason of plaintiffs' pursuit of a frivolous appeal. We grant attorneys' fees and costs under Rule 38, and thus do not consider the alternate claim under 28 U.S.C. § 1927.

The basis for the United Kingdom's request is that the Supreme Court's decision in *Argentine Republic v. Amerada Hess Corp.*, 109 S. Ct. 683 (1989), which was issued about a month after the decision of the district court, utterly foreclosed plaintiffs' argument that the United Kingdom is subject to the jurisdiction of the courts of the United States. *Cf. Saltany*, 702 F. Supp. at 320-21 (dismissing claims against Prime Minister Thatcher on grounds of immunity, (citing *Ex Parte Republic of Peru*, 318 U.S. 578, 589 (1943)) and against the United Kingdom under the "act of state" doctrine).

In *Amerada Hess*, the Court ruled unanimously and unequivocally that the Foreign Sovereign Immunities Act ("FSIA") provides the "sole basis for obtaining jurisdiction over a foreign state in our courts." *Amerada Hess*, 109 S. Ct. at 688. Furthermore, the Court held that a foreign state's use of military force allegedly in violation of international law fell outside any of the exceptions to sovereign immunity provided by the FSIA. *Id.* at 690-92; *see also Tel Oren v. Libyan Arab Republic*, 726 F.2d 774, 775 n.1 (D.C. Cir. 1984) (per curiam) (Edwards, J., concurring) (suit against the Government

of Libya seeking damages for a terrorist attack in Israel was barred because of the exclusivity of the jurisdictional grant in the FSIA), *cert. denied*, 470 U.S. 1003 (1985). Under these holdings, the present appeal was clearly doomed.

Unyielding to the holdings in *Amerada Hess*, however, plaintiffs suggest that the FSIA may authorize this suit because the statute provides that the immunity of a foreign state from the jurisdiction of the courts of the United States is "[s]ubject to existing international agreements to which the United States is a party at the time of enactment of [the FSIA]." 28 U.S.C. § 1604. In *Amerada Hess*, however, the Court examined this language and found that it applies only "when international agreements 'expressly conflic[t]' with the immunity provisions of the FSIA. . . ." *Amerada Hess*, 109 S. Ct. at 692 (quoting H.R. Rep. No. 1487, 94th Cong., 2d Sess. 17, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6604, 6616; S. Rep. No. 1310, 94th Cong., 2d Sess. 17 (1976)).

On appeal, plaintiffs fail to identify any international agreement that "expressly conflicts" with the FSIA, and thus fail to establish any basis for jurisdiction in the courts of the United States. Consequently, we find that *Amerada Hess* clearly bars plaintiffs' claim against the United Kingdom, and that so much was apparent to counsel for plaintiffs before they imposed upon the United Kingdom the burden of this appeal. Accordingly, we grant the United Kingdom's motion for attorneys' fees and costs to be assessed against counsel.

The United Kingdom is directed to submit a statement of fees and costs; counsel for plaintiffs shall respond within fourteen days (14) of the date of their receipt of that accounting.

So ordered.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FARAG M. MOHAMMED SALTANY, et al.,	
Plaintiffs,	
v.	
	Civil Action No. 88-981
RONALD W. REAGAN, et al.,	
Defendants.	[STAMPED:] FILED MARCH 14 1991 CLERK, U.S. DISTRICT COURT DISTRICT OF COLUMBIA

MEMORANDUM AND ORDER

This case is before the Court, on remand from the Circuit Court of Appeals, for the imposition of Rule 11 sanctions upon plaintiffs' counsel.

The British defendants ask to be awarded approximately $116.000 in attorneys' fees and expenses. Plaintiffs' counsel renew their objection to any sanctions award, asserting that the issue remains open notwithstanding

the decision of the Court of Appeals. If sanctions it must be, however, they propose that the Court levy an unspecified form of non-monetary sanction. The amount sought by the British defendants, they say, exceeds the value of their assets, saving only their homes. The British defendants respond that they will content themselves with one half the amount they seek.

The Court concludes that it is not at liberty to refrain from imposing sanctions altogether. It interprets the decision of the Court of Appeals as an unequivocal direction to it to do so. No appropriate "non-monetary" sanction comes readily to mind. None is suggested, and, indeed, the Court is shown no authority for employing such innovations as, for example, community service in lieu of at least partial recompense for an aggrieved opposing

litigant.

Keeping in mind that the Court must select a sanction representing "a case-specific balance between equity, deterrence and compensation," see Hilton Hotels Corp. v. Banov, 899 F.2d 40, 46 (D.C. Cir. 1990), it is, this 14th day of March, 1991,

ORDERED, that Ramsey Clark, Esq., and Lawrence W. Schilling, Esq., each pay the British defendants the sum of ten thousand Dollars ($10,000), payment to be made to the defense counsel within ninety (90) days, failing which the British defendants may have judgment therefor.

/s/

Thomas Penfield Jackson
U.S. District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FARAG M. MOHAMMED SALTANY, et al., Plaintiff,	)	Civil Action
v.	)	No. 88-0981
RONALD M. REAGAN, et al., Defendants	)	[Stamped:] FILED DEC 23 1988

MEMORANDUM AND ORDER

This is an action to recover damages for death, personal injury, and the destruction of property occurring in the course of air strikes by U.S. military forces on targets in the nation of Libya in April, 1986. [1]

Plaintiffs allege themselves to be 55 civilians, all residents of Libya, whose

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[1] On the evening of April 14, 1986, on the order of the President of the United States, U.S. Air Force and U.S. Navy aircraft from bases in the United Kingdom and carriers of the U.S. Sixth Fleet in the Mediterranean Sea, respectively, executed bombing raids in the vicinity of Tripoli and Benghazi, Libya. The President acted, pursuant to Article 51 of the United Nations Charter, to protect U.S. lives and property against acts of terrorism determined by the U.S. government to have been instigated by the Libyan government.

decedents were killed, who suffered personal injuries, or whose property was damaged or destroyed in the attacks. Defendants are the President of the United States, various civilian and military officials of the U.S. government, Prime Minister Margaret Thatcher of the United Kingdom, and the United States and the United Kingdom themselves. In substance, the complaint alleges that all defendants conspired, acted in concert with, and aided and abetted one another in causing or permitting the attacks to be made, with a purpose to assassinate the Libyan head of state, and/or to "terrorize" the civilian population of Libya to the point of revolt against the government. The defendants, thus, are alleged to have violated the criminal and civil laws of several U.S. states, of the United States, certain treaties, and rules of international law.

Jurisdiction is said to be predicated upon various provisions of Title 28 of the

U.S. Code, specifically, sections 1331 (federal question); 1346(b) (the Federal Tort Claims Act); Title 18, section 1964 (the Racketeer Influenced and Corrupt Organization Act ("RICO")) is also said to confer jurisdiction.

All defendants have moved to dismiss the complaint, and for an award of sanctions. [2]

I.

The British defendants, the United Kingdom and Prime Minister Thatcher, are sought to be held liable because the British government gave permission for U.S. Air

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[2]The Court will assume, for purposes of the motions, that it is bound by the rule that all of the well-pleaded factual allegations of the complaint must be taken as true, Miree v. DeKalb County, 433 U.S. 25, 27 n.2 (1977); that plaintiffs are entitled to all favorable inferences which may be drawn therefrom, Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); and that the complaint may not be dismissed unless it appears beyond doubt that plaintiffs can prove no set of facts in support of their claim which would entitle them to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

Force planes based in Great Britain to depart from and return to their air bases to participate in the mission.

Pursuant to 28 U.S.C. § 517 the United States has suggested to the Court the immunity from its jurisdiction of Prime Minister Thatcher as the sitting head of government of a friendly foreign state. The Department of State has made the requisite certification and determination to allow the immunity. The Court must accept them as conclusive. Ex Parte Republic of Peru, 318 U.S. 578, 589 (1943); see Republic of Mexico v. Hoffman, 324 U.S. 30, 34 (1945). The complaint will be dismissed as to the defendant Thatcher.

With respect to the claims made against the United Kingdom itself, the act of state doctrine compels a dismissal of the complaint. Underhill v. Hernandez, 168 U.S. 250, 252 (1897); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). What is

charged is, quite simply, Britain's complicity in an illicit act of war committed by the United States. By any definition that description of the United Kingdom's allegedly wrongful conduct constitutes an archetypal act of state. Permission given by the head of government of one sovereign nation, speaking from its seat of government, to allow its territory to be utilized by an ally, at the ally's express request, to mount a military operation against a third power could not possibly be otherwise characterized. The Court concludes that the doctrine stands as an absolute bar to action against the United Kingdom, and it therefore becomes unnecessary to consider the several other

jurisdictional objections it has advanced in support of its motion to dismiss. [3]

II.

The United States defendants also contend that this Court is without jurisdiction to entertain the claims against them, the issues presented being both non-jusiticiable "political questions" entrusted by the Constitution to the other branches of government, and the several defendants entitled to immunities which render them unamenable to such a civil suit for damages. The Court agrees that all U.S. defendants are immune from this suit and does not,

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[3]The Court notes, however, that the United Kingdom has also asserted its sovereign immunity as a bar to the action. A foreign sovereign's immunity as a defense to suit in courts of the United States is now governed by the Foreign Sovereign Immunities Act, 28 U.S.C. § 1330, 1602-1611, see Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983), and appears to be a viable defense for the United Kingdom to claims such as are asserted here. See 28 U.S.C. § 1604, 1605.

therefore, reach the "political questions" issue.

The United States itself, as a sovereign, is immune from suit except to the extent it has waived its immunity, and a waiver of its sovereign immunity must be unequivocally expressed and never implied. United States v. Mitchell, 445 U.S. 535, 538 (1980). None of the statutory provisions relied upon by plaintiffs to maintain this action against the United States -- the Federal Tort Claims Act (28 U.S.C. § 2671 et seq.), the Alien Tort Claims Act (28 U.S.C. § 1350), the Foreign Claims act (10 U.S.C. § 2734), and RICO (18 U.S.C. § 1964) -- purport to waive the sovereign immunity of the United States with respect to claims

such as those made here. [4] The complaint will be dismissed as to the United States.

The military units were ordered into action by President Reagan in his capacity as commander-in-chief of the armed forces

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[4]The Federal Tort Claims Act expressly preserves the sovereign immunity of the United States for acts of its officials that involve the exercise of discretion, arise from combatant activities in time of war, or arise in a foreign country. 28 U.S.C. § 2680 (a)(j) and (k).

The Alien Tort Claims Act, which confers jurisdiction upon U.S. district courts to hear tort claims by aliens for alleged violations of U.S. treaties and the law of nations, is not itself a waiver of sovereign immunity, at least not that of the United States. Sanchez-Espinoza v. Reagan, 770 F.2d 202, 207 (D.C. Cir. 1985). (But cf. Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 4212 (2nd Cir. 1987), cert. granted, 56 U.S.L.W. 3718 (U.S. April 18, 1988)).

The Foreign Claims Act, allowing administrative claims to be made to the U.S. government for injury to persons or property abroad caused by its armed forces other than in combat, not only fails to contain an express waiver of sovereign immunity, but also contemplates no judicial review of the denial of a claim. See Broadnax v. United States Army, 710 F.2d 865 (D.C. Cir. 1983); 10 U.S.C. § 2735.

RICO merely empowers U.S. district courts to award civil remedies to persons injured by a "pattern of racketeering activity."

of the United States under Article II, section 2, of the Constitution. In so doing he acted with absolute immunity from liability in private civil suits for damages. Nixon v. Fitzgerald, 457 U.S. 731 (1982). The complaint must be dismissed as to the defendant Reagan.

All other named defendants are civilian or military officials of the United States government who are alleged to have planned and/or executed the air strikes ordered by the President. That they did so in their official capacities, and none other, is manifest, and plaintiffs do not allege otherwise. The avowed objective of the operation, irrespective of motive, was to inflict injury upon the Libyan targets which would be "tortious" were it to be judged by any civil law standards. The mission also called upon each participant of every rank to exercise discretion in a myriad of contexts of utmost complexity and gravity,

not to mention danger. And each acted, as duty required, in accordance with the orders of the commander-in-chief or a superior officer. In the circumstances presented by this case, the Court concludes that each of the other named U.S. defendants is similarly entitled to immunity from this suit, whether the immunity is classified as absolute or qualified, and whatever the origins of the rights plaintiffs claim may have been violated. See Harlow v. Fitzgerald, 457 U.S. 800 (1982). The complaint will be dismissed as to each of them.

III.

The plaintiffs, purportedly citizens or residents of Libya, cannot be presumed to be familiar with the rules of law of the United States. It is otherwise, however, with their counsel. The case offered no hope whatsoever of success, and plaintiffs' attorneys surely knew it.

The injuries for which suit is brought are not insubstantial. It cannot, therefore, be said that the case is frivolous so much as it is audacious. The Court surmises it was brought as a public statement of protest of Presidential action with which counsel (and, to be sure, their clients) were in profound disagreement. The courts of the United States, however, serve in some respects as a forum for making such statements, and should continue to do so. As Justice Stevens said, as the Supreme Court dismissed, but declined to impose sanctions for, a meritless appeal:

> Freedom of access to the courts is a cherished value in our democratic society. Incremental changes in settled rules of law often result from litigation. The courts provide the mechanism for the peaceful resolution of disputes that might otherwise give rise to attempts at self-help. There is, and should be, the strongest presumption of open access to all levels of the judicial system. Creating a risk that the invocation of the judicial process may give rise to punitive sanctions simply because the litigant's claim is unmeritorious could only deter the legitimate exercise of

> the right to seek a peaceful redress of grievances through judicial means.

Talamani v. Allstate Insurance Co., 470 U.S. 1067, 1070-71 (1985). For essentially those reasons, therefore, the Court will deny defendants' applications for an award of sanctions.

It is, this 23rd day of December, 1988,

ORDERED, that the complaint is dismissed with prejudice as to all defendants; and it is

FURTHER ORDERED, that defendants' application for an award of sanctions is denied.

THOMAS PENFIELD JACKSON

U.S. District Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-5107 September Term, 1991

CA 88-0981

Farag M. Mohammed Saltany, et al.,

Appellants

v.

Ronald W. Reagan, President of the U.S., et al.

BEFORE:
Wald, Edwards and D.H. Ginsburg, Circuit Judges

[Stamped:]
FILED JUN 26 1992
Constance L. Dupré
CLERK

O R D E R

Upon consideration of appellants' petition for rehearing, filed May 26, 1992, it is

ORDERED,
by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK
BY: s/ Robert A. Bonner
Deputy Clerk

Circuit Judge Wald would grant the Petition for Rehearing

COMPLAINT CIVIL ACTION NO. 88-0981

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FARAG M. MOHAMMED SALTANY, as personal representative of KHLOUD HASAN AL-ORAIBI, deceased and HASAN MOHAMED AL-ORAIBI, deceased; MOHAMMED A. TARHONY, as personal representative of HALIMA MOHAMED ABDUL QADIR, deceased; ABDOLHAMED ALI ALMESMARY, as pesonal representative of MOHAMED ALI AL-MISMARI, deceased; MASSUD A. ABDOLMOLLA, as personal representative of SALEH ABDUL KARIM ABDUL MAULA, deceased, SALLAH M. MOHAMMED, as personal representative of ABDUL QADIR SALEH MOHAMED AL-MARTOUZ, deceased; ABDALLA ALI EL YAZBI, as personal representative of MOHAMMAD YOUSSEF ALYAZGY, deceased, RASHAA MOUNIR SHARMEETT, deceased, KHADIJA SOLIMAN PASHA AGHA, deceased, YOUSSSEF ALY ALYAZGY, deceased and KHADIFA ALY ALYAZGY, deceased; B.F. AL-GHUSSEIN, as personal representative of RAFAT BASSAM AL-GHUSSEIN, deceased; ALI MILAD TWER, as personal representative of NAJIA MOHAMED ALTHOIR, deceased; ABDULMAGID IBRAHIM AL-MISHERGHI, as personal representative of MOHAMED IBRAHIEM AL-MSHIRGI, deceased; HANIYA M. HEGAB, as personal representative of MAHFOUD AL-SHEIK AL-MISURATI, deceased; NASR ALI MASOUD; BELGASIM ABRIEK ALI IBRAHM; SALEM MOHAMED ABDULA KNUBER ALI; KHALID MOHAMMAD SADEK AL-ZKAR; BASSAM FAWZI TAWFIC AL-GHUSSEN; SAID A.S. HITACH; MANSOUR SLIEH SLAMA; SALEM OMAR SALEM HDAIDAN; AMBURKA SALIM FARAHAT; NAJIA MOHAMED YAHIA; FAUZIA MILAD ALI ALTHOIR; HANIYAAH MOHAMMAD HAJAAB; MOUMAN MAHFOUD EL-SHEIK; NAJID MAHFOUD EL-SHEIK; FATIMA MAHFOUD AL-SHEIK; AHLAM MOHAMAD HEGAB; ABO-EGELA MOHAMMAD GRANA; FATMA MOHAMMED BACKUSH; ASMAA ABOEGELA GRANA; NAIMA HUSSEIN ABOZODA; NAIMA ABOEGELE GRANA; ABBULNASSER

ABO-EGELA MOHAMMAD GRANA; ;MOHAMMED ABOEGELA M. GRANA; ABU-ZIED OMAR DOORDA; AHMED ABU-ZIED OMAR DOORDA; MOURAD MOHAMED IBRAHIEM AL-MSHIRGI; MUNIEM MOHAMED IBRAHIEM AL-MSHIRGI; AWAISHA ALTAHIER IBRAHIEM BAKIER; MAHAA MOHAMED IBRAHIEM AL-MSHIRGI; MOHAMMAD SALEH ALI AL-GANZOURI; BREKA MABROKA SALEH AL-GANZOURI; MABROKA AHMAD ABOU-ESSBA; OUSSAMAH F.E. AL-SHRIF; ALI HIEDER IBREHIEM ALTHONALI; FATMA MOHAMMAD AL-SABLI; HALIMA ABD ELGAMI AL-KESHIK; MOHARRAM MOHAMED ALTHONALI; ALI MASOUD BEN ALI; and IZZEDDIN ALI MASOUD;

Plaintiffs,

Plaintiffs are all residents of the nation of Libya. Their address in the United States is:
c/o Ramsey Clark
36 East 12th Street
New York, N.Y. 10003

-v-

Ronald W. Reagan, President of the United States; Margaret Thatcher, Prime Minister of the United Kingdom; Caspar W. Weinberger; Admiral William J. Crowe, Jr., USN; Legal representative of the Estate of William J. Casey, deceased; General Bernard W. Rogers; Admiral Frank B. Kelso, Jr.; General Charles A. Gabriel; John Doe and Ruth Roe, et. al.; the United Kingdom; and the United States of America,

Defendants.

COMPLAINT FOR DAMAGES FOR VIOLATIONS OF THE INTERNATIONAL LAWS, THE CONSTITUTION, LAWS AND TREATIES OF THE UNITED STATES, THE LAWS OF LIBYA, THE DISTRICT OF COLUMBIA, VIRGINIA AND OTHER STATES UNDER THE ALIEN TORT

STATUTE, FEDERAL TORT CLAIMS ACT, FOREIGN CLAIMS ACT AND RICO

Plaintiffs, by their attorneys, for their complaint herein, respectfully allege as follows:

1. This is an action by or on behalf of 55 men, women, and children, all civilians, who were killed or injured in the U.S. bombing of Libya on April 14-15, 1986. Plaintiffs seek to recover damages for death, personal injury and the destruction of property. The action is against the United States of America, the United Kingdom, President Ronald W. Reagan, Prime Minister Margaret Thatcher and other present and former civilian and military officials and officers of the United States. The actions of the defendants leading to the bombing of Libya by aircraft of the United States Air Force and Navy violated the law of nations, international laws, maritime law, the Constitution, laws and treaties of

the United States, and the laws of Libya, the District of Columbia, California, Virginia and other states and were tortious. Plaintiffs' claims are being asserted under the Alien Tort Statute and the Federal Tort Claims Act, among other laws. Plaintiffs are all aliens and residents of Libya although some are absent from Libya from time to time for medical or other reasons.

2. This court has jurisdiction of this action under 28 U.S.C. 1331, 1346(b), 1350 and 1361, and 18 U.S.C. 1964, and principles of pendent jurisdiction.

3. Defendants are guilty of conduct constituting clear violations of settled principles of international law prohibiting the use of force by a state against the territorial integrity or political independence of another state, requiring settlement of international disputes by peaceful means, prohibiting armed attacks by a state against civilians, and prohibiting

crimes against heads of state and other internationally protected persons. These principles are established by the United Nations Charter, U.N. General Assembly resolution 2625 (24 October 1970), "Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations," the Universal Declaration of Human Rights, the international law of armed conflict, the Charter of the International Military Tribunal (Nuremberg Charter), the General Assembly Resolution adopting the Nuremberg Charter Principles, the Geneva Convention for the Protection of Civilians (1949), the Annexed Regulations to Hague Convention No. IV of 1907, Hague Convention No. IX of 1907 concerning Bombardment by Naval Forces in Time of War, The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons (New York

1973), and other agreements, resolutions, treaties, declarations, documents and practices constituting the customary international law of human rights and the law of nations. Neither the United States nor the United Kingdom can invoke sovereign immunity under domestic law as a bar to the jurisdiction of this Court or as a defense on the merits.

4. This action arises under the Constitution, laws and treaties of the United States, including without limitation, the treaties of the United States set forth in the preceding paragraph; U.S. Const. Art. II, Sec. 3, commanding the President and other officials to take care that laws be faithfully executed, U.S. Const., Art. I, Sec. 8, conferring exclusive power on Congress to declare war, clause 11, and to define and punish offenses against the Law of Nations, clause 10; the criminal laws of the United States, including among others,

18 U.S.C. 956, 960 and 371, and the criminal laws of the District of Columbia, Virginia, California and other States; Executive Order No. 12333, promulgated by President Reagan, prohibiting U.S. employees from engaging in, or conspiring to engage in, assassination; directives of the Secretary of Defense and the Judge Advocates General of the Air Force and Navy, giving effect to the international prohibitions against armed attacks directed at civilans, e.g. the U.S. Air Force Manual, International Law -- The Conduct of Armed Conflict and Air Operations (AF 110-31, 19 Nov. 1976), para. 5-3; The Commander's Handbook on the Law of Naval Operations (Naval Warfare Publication 9, 1987) Chap. 8 and provisions of the Code of Military Justice which make clear that the only military orders which must be obeyed are orders which are lawful, see e.g. 10 U.S.C. 892, providing punishment for failure "to obey any lawful general order or

regulation..." and that obedience to an order to commit a criminal or unlawful act is no defense.

5. Written claims by or on behalf of the plaintiffs in this action for deaths, injuries and damage incurred in the U.S. bombing of Libya described in this complaint were duly filed in April, May and June, 1987 with the Office of the White House and the United States Department of Defense in accordance with the prescribed procedures for the filing of claims under the Federal Tort Claims Act. The Department of Defense referred the claims that were filed with it to the Department of the Air Force. The Air Force considered the claims under the Foreign Claims Act, 10 U.S.C. 2734, and denied them as such by letter dated October 16, 1987. To date, no denial or notice of any other action taken on the claims filed with the Office of the White House has been communicated to plaintiffs.

6. Plaintiffs are the personal representatives of 15 persons who were killed in the U.S. bombing of Libya described in this complaint, and 40 survivors of the bombing who sustained serious personal injuries and property loss. Plaintiff FARAG M. MOHAMMED SALTANY is the personal representative of HASAN MOHAMED AL-ORAIBI, 38, who was killed by shrapnel to his skull, and of his daughter KHLOUD HASAN AL-ORAIBI, an infant 3 months of age, who was killed by shrapnel penetrating her hest as she slept, both in their home in a residential area of Benghazi at about 2:00 a.m. on April 15, 1986, Libyan time. The other plaintiffs who are personal representatives of persons killed by the bombing are MOHAMMED A. TARHONY, representative of HALIMA MOHAMED ABDUL QADIR, deceased; ABDOLHAMED ALI ALMESMARY, representative of MOHAMED ALI AL-MISMARI,

deceased; MASSUD A. ABDOLMOLLA representative of SALEH ABDUL KARIM ABDUL MAULA, deceased; SALLAH M. MOHAMMED representative of ABDUL QADIR SALEH MOHAMED AL-MARTOUZ, deceased; ALI ABDALLA ALI EL YAZBI representative of MOHAMMAD YOSSSEF ALYAZGY, deceased, RASHAA MOUNIR SHARMEETT, deceased, KHADIJA SOLIMAN PASHA AGHA, deceased, YOUSSEF ALY ALYAZGY, deceased, and KHADIFA ALY ALYAZGY, deceased; B.F. AL-GHUSSEIN representative of RAFAT BASSAM AL-GHUSSEIN, deceased; ALI MILAD TWER representative of RAFAT BASSAM ALTHOIR, deceased; HANIYA M. HEGAB representative of MAHFOUD AL-SHEIKH AL-MISURATI, deceased, and ABUDLMAGID IBRAHIM AL-MISHERGHI representative of MOHAMED IBRAHIEM AL-MSHIRGI, deceased.

7. The remaining 40 plaintiffs are persons who survived the bombing and are suing for serious personal injuries and property damage sustained in the bombing.

They are SALEM MOHAMED ABDULA KNUBER ALI, NASR ALI MASOUD, BELGASIM ABRIEK ALI IBRAHM, KHALID MOHAMMAD SADEK AL-ZKAR, BASSAN FAWZI TAWFIC AL-GHUSSEN, SAID A.S. HITACH, MANSOUR SLIEH SLAMA, SALEM OMAR SLEM HDAIDAN, AMBURKA SALIM FARAHAT, NAJIA MOHAMED YAHIA, FAUZIA MILAD ALI ALTHOIR, HANIYAAH MOHAMMAD HAJAAB, MOUMAN MAHFOUD EL-SHEIK, NAJIB MAHFOUD EL-SHEIK, FATIMA MAHFOUD AL-SHEIK, AHLAM MOHAMAD HEGAB, ABO-EGELA MOHAMMAD GRANA, FATMA MOHAMMED BACKUSH, ASMAA ABOEGELA GRANA, NAIMA HUSSEIN ABO-ZODA, NAIMA ABOEGELE GRANA, ABDULKARIM ABO-EGELA MOHAMMAD GRANA, ABDULNASSER ABO-EGELA MOHAMMAD GRANA, MOHAMMED ABEGELA M. GRANA, ABU-ZIED OMAR DOORDA, AHMED ABU-ZIED OMAR DOORDA, MOURAD MOHAMED IBRAHIEM AL-MSHIRGI, MUNIEM MOHAMED IBRAHIEM AL-MSHIRGI, AWAISHA ALTAHIER IBRAHIEM BAKIER, MAHAA MOHAMED IBRAHIEM AL-MSHIRGI, MOHAMMAD SALEH ALI AL-GANZOURI, BREKA MABROKA SALEH AL-GANZOURI, MABROKA AHMAD ABOU-ESSBA, OUSSAMAH F.E. AL-

SHRIF, ALI HIEDER IBREHIEM ALTHONALI, FATMA MOHAMADA AL-SABLI, HALIMA ABD ELGAMI AL-KESHIK, MOHARRAM MOHAMED ALTHONALI, ALI MASOUD BEN ALI and IZZEDDIN ALI MASOUD.

8. Defendants United States of America and the United Kingdom are being sued under 28 U.S.C. 1350 for their clear violations of settled principles of international law for which they are not entitled to invoke any immunity as sovereigns. In addition, the United States has waived its sovereign immunity with respect to the claims set forth in this complaint under the Federal Tort Claims Act, principally 28 U.S.C. 1346(b), 2401(b), 2402, 2671-80.

9. Defendant Ronald W. Reagan is President of the United States, Commander-in-chief of the armed forces and a member of the National Security Council. He is being sued in his individual and official capacities.

10. Defendant Margaret Thatcher is Prime Minister of the United Kingdom. She is being sued individually and in her official capacity.

11. Defendant Caspar W. Weinberger was the Secretary of Defense and a member of the National Security Council when the U.S. air strike on Libya was planned, approved, ordered, implemented and carried out. He is being sued individually and for action taken in his official capacity.

12. Defendant Admiral William J. Crowe, Jr., USN, was Chairman, Joint Chiefs of Staff and a member of the National Security Council when the U.S. Air strike on Libya was planned, approved, ordered, implemented and carried out. He is being sued individually and in his official capacity.

13. Defendant General Charles A. Gabriel, was Chief of Staff of the Air Force when the U.S. air strike on Libya was

planned, approved, ordered, implemented and carried out. He is being sued individually and in his official capacity.

14. Defendant General Bernard W. Rogers, U.S. Army, retired, was United States Military Commander in Europe and was in charge of the Air Force and Navy aircraft that carried out the U.S. air strike on Libya.

15. Defendant Admiral Frank B. Kelso, Jr., was Vice-Admiral in command of the United States Sixth Fleet, USN, that carried out the air strike on Libya.

16. The legal representative of the Estate of William J. Casey is named as a defendant. Mr. Casey was the Director of the Central Intelligence Agency and a member of the National Security Council when the U.S. air strike on Libya was planned, approved, ordered, implemented and carried out. He is being sued in his representative capacity for liabilities incurred by Mr.

Casey individually and in his official capacity.

17. John Doe, Ruth Roe et al. are defendants whose identities and precise roles have yet to be ascertained. They are individuals who personally planned, approved, ordered, implemented or carried out the air strike on Libya, including without limitation, officers who flew in command of the Air Force and Navy units that dropped the bombs on Libya.

18. The defendants who are present or former civilian or military officers and officials of the United States are sometimes referred to in this complaint as the federal defendants.

19. On the night and early morning of April 14-15, 1986, aircraft of the United States Air Force and Navy conducted a surprise, clandestine bombing attack on the nation of Libya.

20. The aircraft were launched from U.S. bases in Great Britain and from U.S. aircraft carriers in the Mediterranean Sea.

21. Upon information and belief, defendant Thatcher gave the United States permission to use American bases in the United Kingdom to launch the attack on Libya knowing that the attack was illegal and would necessarily kill civilians.

22. Upon information and belief, other nations were requested by the United States to participate or grant permission in some way for the attack on Libya. These requests were refused. For example, France refused permission for the aircraft launched from the United Kingdom to fly over its territory, which would have been the direct route from the United Kingdom to Libya. This greatly increased the difficulty of the flight and the risks of heavy civilian casualties in the bombing as defendants well knew.

23. The United States aircraft dropped bombs on and near the Libyan capital, Tripoli, the city of Benghazi, and the air base at Benina.

24. Much damage was done to civilian areas. Many civilian men, women and children were killed or injured, including plaintiffs in this action and their decedents. Much civilian property was damaged or destroyed.

25. Several embassies were damaged.

26. Upon information and belief, the decision to have U.S. aircraft bomb Libya was made by President Reagan at the California White House on or about April 5, 1986.

27. Upon information and belief, plans for the attack on Libya were developed by the Joint Chiefs of Staff, the National Security Council, the Office of the White House and other agencies. The federal defendants met and communicated with one

another and otherwise participated directly in planning, approving, ordering, implementing or carrying out the air strike upon Libya described in this complaint. This was done by the federal defendants in the District of Columbia, California, Virginia and elsewhere within and outside the United States.

28. Upon information and belief, the primary purpose, or a primary purpose of the bombing of Libya described in this complaint which the federal defendants shared, or knew or should have known, was to kill the head of state of Libya, Col. Muammar Qaddafi, and to terrorize Libyans by inflicting injury upon the civilian population in order to undermine support for the government of Col. Qaddafi and to cause or encourage his overthrow. This purpose, which the federal defendants sought to conceal and deny, was illegal and for this reason, among others, the actions of the

federal defendants in planning, approving, ordering, implementing or carrying out the air strike upon Libya described in this complaint, whether or not done within the scope of their employment, were unauthorized and contrary to statutory and constitutional prescription. In their actions taken in their official capacities the federal defendants acted under color of law but beyond or contrary to their lawful authority and in an unconstitutional manner.

29. At the time of the bombing of Libya described in this complaint no state of war existed between the United States and Libya. No law of the United States and no international law authorized, justified or permitted United States aircraft as they did to violate the territorial integrity and air space of Libya by entering it for military purposes, nor to drop bombs upon Libya for any purpose, nor to drop bombs that hit and injured civilians and destroyed civilian

property, nor to drop bombs directed at the head of state and civilian areas for the purpose of killing the head of state and killing and injuring civilians.

30. On information and belief, under all of the circumstances pertinent to the bombing of Libya described in this complaint, including without limitation, the size and technology of the ordnance used, the high speed and low altitude of the aircraft and other conditions affecting delivery of the bombs, and the concentration of civilians in and around Tripoli, Benghazi and Benina Air Base, it was inescapable that civilian casualties and damages to civilian property would result from the attack. Defendants knew or should have known of this certainty of harm.

31. Defendants and others entered into and carried out a conspiracy, aided and abetted one another and others, and acted jointly and in concert to bring about the

illegal U.S. bombing of Libya described in the complaint. Their actions in so doing, in planning, approving, ordering, implementing and carrying out the air strike, were done in the District of Columbia, California, Virginia and elsewhere in the United States, as well as in Libya, the United Kingdom and elsewhere outside the United States. These actions were a proximate cause of the deaths, injuries and property damage in Libya for which plaintiffs are seeking to recover their damages in this action. Each defendant is directly liable for his own illegal, tortious acts and is vicariously liable for the illegal, tortious acts of the other defendants and third persons with whom he conspired, or acted in concert or aided and abetted. All defendants are liable for the deaths, injuries and property damage in Libya for which plaintiffs are seeking to recover their damages in this action.

FIRST CLAIM

32. Plaintiffs incorporate by reference the preceding allegations of this complaint.

33. Defendants' actions as aforesaid constitute torts cognizable under 28 U.S.C. 1350 or 28 U.S.C. 1331 or both in violation of the law of nations and treaties of the United States as established by the authorities described in paragraph 3 and 4 of this complaint and other pertinent treaties, declarations, documents, and practices constituting settled principles of the customary international law of human rights, the law of nations and treaties of the United States.

SECOND CLAIM

34. Plaintiffs incorporate by reference the preceding allegations of this complaint.

35. Defendants' actions as aforesaid constitute torts cognizable under 28 U.S.C.

1350 or 28 U.S.C. 1331 or both in violation of the Constitution, laws and treaties of the United States, as evidenced by the authorities described in paragraphs 3 and 4 of this complaint, and other relevant provisions of the Constitution, laws and treaties of the United States.

THIRD CLAIM

36. Plaintiffs incorporate by reference the preceding allegations of this complaint.

37. Defendants' actions as aforesaid constitute violations of the tort law of Libya, the District of Columbia, California, Virginia and other States.

FOURTH CLAIM

38. Plaintiffs incorporate by reference the preceding allegations of this complaint.

39. Defendants' actions as aforesaid constitute violations of international law

as described in paragraph 3 of the complaint.

FIFTH CLAIM

40. Plaintiffs incorporate by reference the preceding allegations of this complaint.

41. Actions of the federal defendants are aforesaid done in California, Virginia, the District of Columbia and elsewhere in the United States within the scope of their federal employment were a proximate cause of the injuries sustained by plaintiffs and their decedents in the U.S. bombing of Libya described in the complaint for which the United States is liable under the Federal Tort Claims Act.

SIXTH CLAIM

42. Plaintiffs incorporate by reference the preceding allegations of this complaint.

43. Upon information and belief, it is being claimed on behalf of the United States

that American bombs erroneously and inadvertently hit civilian areas in the raid on Libya on April 14-15, 1986. The Pentagon made such an announcement in May 1986. Given these statements in the nature of admissions, it was clear error and a violation of a mandatory duty for the United States Air Force to deny the administrative claims of plaintiffs which it considered under the provisions of the Foreign Claims Act, 10 U.S.C. 2734. The regulations of the Air Force for claims under the Foreign Claims Act flatly state, 32 CFR 842.64(m): "...Pay claims arising from accident or malfunction of aircraft operations, including airborne ordnance, occurring while preparing for, going to, or returning from a combat mission."

44. Plaintiffs are therefore entitled to an order in the nature of mandamus directing the federal defendants now in office to cause the Air Force to vacate its

denial of plaintiffs' claim and to reconsider and pay the claims.

SEVENTH CLAIM

45. Plaintiffs incoporate by reference the preceding allegation of this complaint.

46. The actions of the federal defendants as aforesaid constitute a pattern of racketerring activity within the meaning of Title IX of the Organized Crime Control Act of 1970, Racketeer Influenced and Corrupt Organizations ("RICO"), in that defendants have committed at least two acts of racketeering activity enumerated in 18 U.S.C. 1961(1) (A) and (B) in the course of the concerted action and conspiracy against Libya, its Head of State and its people described in this complaint, and in previous overt and covert hostile attacks and other illegal and criminal actions by the federal defendants, or some of them, against Libya, its Head of State and its people.

47. Each of the federal defendants committed at least two such racketeering acts, or aided and abetted in their commission or is otherwise vicariously responsible for their commission.

48. The concerted action and conspiracy against Libya, its Head of State and its people described in this complaint is an enterprise within the meaning of 18 U.S.C. 1961(4), affecting interstate and foreign commerce, which also includes the association in fact of the federal defendants and others in planning, approving, ordering implementing and carrying out previous overt and covert hostile attacks and other illegal and criminal actions against Libya, its Head of State and its people.

49. The federal defendants as persons employed by and associated with the aforesaid enterprise conducted or participated, directly or indirectly, in the

conduct of the enterprise's affairs through a pattern of racketeering activity and conspired to do so in violation of 18 U.S.C. 1962(c) and (d).

50. The federal defendants' violations of 18 U.S.C. 1962(c) and (d) proximately causes injuries to the business and property of plaintiffs and their decedents.

WHEREFORE plaintiffs pray for judgment against defendants for compensatory and punitive damages in the amounts the proof shall establish, trebled for plaintiffs' claims under RICO, except that no punitive damages are sought against the United States under the Federal Tort Claims Act, together with reasonable attorneys fees, interest, costs and disbursements, and alternatively for the order described in the complaint causing the Air Force to vacate its denial

and to reconsider and pay plaintiffs' administrative claims.

Dated: New York, N.Y.

April 12, 1988

s/Ramsey Clark

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(2)

Supreme Court, U.S.
FILED
OCT 22 1992
OFFICE OF THE CLERK

No. 92-529

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

RAMSEY CLARK and LAWRENCE W. SCHILLING,
Petitioners,

v.

MARGARET THATCHER, former Prime Minister of Great Britain and THE UNITED KINGDOM,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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October 22, 1992

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the District of Columbia Circuit correctly concluded that Petitioners violated Fed. Rule Civ. P. 11 by suing the United Kingdom and former Prime Minister Thatcher for damages allegedly incurred as a result of the U.S. bombing raid on Libya in April 1986.

2. Whether the Court of Appeals correctly concluded that plaintiffs' appeal of the District Court's dismissal of their action was frivolous, in violation of Fed. Rule App. P. 38.

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This case is here for a second time. Two years ago, this Court denied a petition for a writ of certiorari seeking review on the merits of the lower courts' dismissal of the complaint. Now, Petitioners, counsel for the plaintiffs in the underlying litigation, seek review of the lower courts' imposition of sanctions under Fed. Rule Civ. P. 11 and Fed. Rule App. P. 38.

The litigation arose out of claims by 55 Libyan nationals who sought to recover from the United Kingdom of Great Britain and Northern Ireland ("United Kingdom") and its then Prime Minister, Margaret Thatcher, as well as from the United States, President Reagan, and other U.S. Government officials, damages for alleged personal injuries, death, and property loss in Libya. According to the

Complaint (A30),[1] the plaintiffs' damages were alleged to have resulted from a bombing raid carried out on April 14-15, 1986 on Libyan territory by aircraft of the United States Air Force and Navy, launched from U.S. bases in the United Kingdom and from U.S. aircraft carriers in the Mediterranean Sea. Plaintiffs alleged that the United Kingdom and Prime Minister Thatcher gave the United States permission to use American bases in the United Kingdom to launch the attack on Libya "knowing that the attack was illegal" under various international agreements, resolutions, treaties, declarations, and documents asserted to constitute the customary international law of human rights.

The Respondents moved to dismiss the action as to them on grounds of lack of subject matter and personal jurisdiction, nonjusticiability of plaintiffs' claims under the act of state and political question doctrines, and failure to adequately plead a cause of action. They also moved for an award of attorneys' fees and costs under Fed. Rule Civ. P. 11.

The District Court dismissed the plaintiffs' claims as to all defendants (A17, 702 F. Supp. 319 (D.D.C. 1988)) and held that "[t]he case offered no hope whatsoever of success, and plaintiffs' attorneys surely knew it." (A26, 702 F. Supp. at 322.) Nonetheless, it declined to award attorneys' fees and costs to Respondents under Rule 11 on the ground that the suit was "brought as a public statement of protest of Presidential action with which counsel (and, to be sure, their clients) were in profound disagreement." (A27, 702 F. Supp. at 322.) On appeal the Court of Appeals for the District of Columbia Circuit summarily affirmed the dismissal of the Complaint "substantially for the reasons stated" by the District Court. (A7, 886 F.2d at 441.) In addition, the Court of Appeals

[1] Citations are to the Appendix to the Petition (A——).

granted Respondents' motion for summary reversal of the District Court's decision not to impose sanctions under Rule 11 and remanded the matter to the District Court for imposition of an appropriate sanction.

With respect to Rule 11, the Court of Appeals stressed the District Court's finding that Petitioners "surely knew" that plaintiffs' case "offered no hope whatsoever of success." By virtue of that finding, the Court held that "the district court had already determined in effect that a [Rule 11] violation had occurred," which violation could not properly be disregarded on the asserted ground that the federal courts should serve as a fora for "protests" of Presidential action. (A12, 886 F.2d at 440.) The Court of Appeals also granted, pursuant to Fed. Rule App. P. 38, Respondents' request for attorneys' fees and costs incurred on the appeal. The Court explained that this Court's decision in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), "clearly bars plaintiffs' claim against the United Kingdom, and . . . so much was apparent to counsel for plaintiffs before they imposed upon the United Kingdom the burden of this appeal." (A13, 886 F.2d at 431.) The fees and costs for the appeal were subsequently fixed by the Court of Appeals in the amount of $16,852.07 and taxed jointly and severally against Petitioners.

After Petitioners' first petition for writ of certiorari was denied, 495 U.S. 932 (1990), Petitioners complied with the Court of Appeals' Rule 38 order and paid Respondents the amount assessed by the Court of Appeals.

On remand, Respondents filed an application with the District Court for monetary sanctions under Rule 11 in the amount of the approximately $116,000 in attorneys' fees and disbursements that they had incurred. Petitioners argued in opposition that Rule 11 had not been violated and that, if it had, the appropriate sanction

would be a nonmonetary sanction or a monetary sanction that is nominal in amount. The District Court held that it had received from the Court of Appeals an unequivocal direction to impose sanctions. Quoting the Court of Appeals' decision in *Hilton Hotels Corp. v. Banov*, 899 F.2d 40, 46 (D.C. Cir. 1990), which calls for the selection of a sanction for a Rule 11 violation representing "a case-specific balance between equity, deterrence, and compensation," the District Court concluded that Petitioners should each pay Respondents the sum of ten thousand dollars. (A14-16.)

In their second appeal Petitioners sought to challenge again the award of Rule 11 and Rule 38 sanctions against them. The Court of Appeals held that "the law of the case doctrine bars this challenge." (A2, 960 F.2d 1060.) It also rejected Petitioners' argument that a non-monetary Rule 11 sanction should have been imposed because "the District Court considered this possibility and reasonably exercised its discretion to impose a fine instead." *Id.*

ARGUMENT

The Court of Appeals correctly applied established law in holding that Petitioners violated Rule 11 and Rule 38 and in affirming the Rule 11 sanctions imposed by the District Court. The United Kingdom and its former Prime Minister have been subjected to more than four years of litigation on claims that, as the District Court correctly recognized, had no prospect for success from the outset. The Rule 11 sanctions ordered by the District Court and the Rule 38 sanctions ordered by the Court of Appeals go only a small fraction of the way toward making Respondents whole for the expense and disruption caused by Petitioners' decision to pursue this litigation. Although their argument is replete with rhetorical flourishes, Petitioners do not contend that the decision below conflicts with that of any other federal court of appeals or any applicable decision of this Court. Nor does the case present any important but unsettled question of federal law. None

of the considerations identified in Rule 10 of the Rules of this Court is present, and the decision below is plainly correct. Further review is not warranted.

I. THE COURT OF APPEALS DID NOT ERR IN AFFIRMING RULE 11 SANCTIONS

Petitioners argue that the Court of Appeals' first decision, by holding that Petitioners violated Rule 11, erroneously failed to give "the required deference to the District Court's decision to deny sanctions and erroneously precluded the District Court on remand from exercising its full discretion under Rule 11." Petition at iii. That argument is inconsistent with this Court's holdings in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990).

Cooter & Gell held that "an appellate court should apply an abuse-of-discretion standard in reviewing all aspects of a district court's Rule 11 determination." 496 U.S. at 405. The case further held, however, that "[a] district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Id.* After reviewing in detail the background of the strengthened Rule 11 ("any interpretation must give effect to the rule's central goal of deterrence," *Id.* at 393), this Court emphasized that the rule *mandates* the imposition of sanctions when a violation is found. *Id.* at 395.

The Court of Appeals' remand in this litigation was fully consistent with this Court's rulings in *Cooter & Gell*. The Court of Appeals did not conduct a *de novo* review and reverse the District Court on the question of whether the standard for imposition of sanctions under Rule 11 had been met. Rather, the Court correctly concluded that the District Court had "found, in substance if not in terms, that plaintiffs' counsel had violated Rule 11." (A11, 886 F.2d at 440.) The District Court nevertheless committed legal error when it denied sanctions based on the legally flawed reasoning that the federal courts may func-

tion as a forum for "protests." *Id.* As this Court said in *Cooter & Gell*, it is entirely proper and indeed necessary, for an appellate court to correct a district court's *legal errors* in applying Rule 11. Where a district court has relied "on a materially incorrect review of the relevant law," the Court of Appeals should intervene. 496 U.S. at 402. "[I]f a district court's findings rest on an erroneous view of the law, they may be set aside on that basis." *Id.* (quoting *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982)). The Court of Appeals left it to the District Court to determine in the first instance what appropriate Rule 11 sanctions should be imposed. The Court of Appeals did not disturb the District Court's conclusions in that regard.

Cooter & Gell makes it plain, as does Rule 11 itself, that the District Court has great leeway in selecting the appropriate sanction where a violation of the Rule has occurred:

> No dispute exists that the appellate courts should review the district court's selection of a sanction under a deferential standard. In directing the district court to impose an "appropriate" sanction, Rule 11 itself indicates that the district court is empowered to exercise its discretion. *See also* Advisory Committee Note on Rule 11, 28 U.S.C. App., p. 576 (suggesting a district court "has discretion to tailor sanctions to the particular facts of the case, with which it should be well acquainted").

496 U.S. at 400.

The District Court was well-acquainted with this case when it considered what would be an appropriate sanction. It clearly did not abuse its discretion in selecting the sanction of a $10,000 monetary payment to Respondents from each of the Petitioners. The District Court's decision followed a meeting with counsel in chambers, an unsuccessful effort between counsel to negotiate a mutually acceptable monetary sanction, and the filing of substantial papers on the subject by the parties.

Counsel for the Respondents established that the latter had expended $115,957.26 in reasonable atttorneys' fees and expenses in defending against the initial District Court phase of this case. Petitioners did not challenge the reasonableness or necessity of the attorneys' fees and expenses incurred by Respondents, but they did assert that a sanction in the amount of those fees and expenses might exceed the value of their assets. Respondents replied, *inter alia*, that, while they believed that meaningful monetary sanctions should be applied, they had no desire to injure Petitioners and would defer to the District Court's discretion on the amount to be awarded.

The District Court considered the parties' positions and decided that a non-monetary sanction would not be appropriate here.

> No appropriate "non-monetary" sanction comes readily to mind. None is suggested, and, indeed, the Court is shown no authority for employing such innovations as, for example, community service in lieu of at least partial recompense for an aggrieved opposing litigant.

(A15-16.) The District Court then imposed monetary sanctions on Petitioners totalling approximately 17 percent of the amount that Respondents had established as reasonably incurred in their defense. *Id.*

Whether a particular sanction or type of sanction is "appropriate" is, of course, at the heart of the District Court's discretionary power. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. at 400. The District Court expressly rejected the idea of community service in lieu of payment of at least partial compensation to the aggrieved parties here. It obviously considered public censure or public admonition of Petitioners to be also inappropriate here.[2]

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[2] These sanctions would, similarly, fail to provide at least patrial recompense to the aggrieved parties. In addition, the District Court may have reasoned, notwithstanding the argument being made by Petitioners, that the public censure or public admonition of a prac-

Moreover, attorneys' fees awards "have become the Rule 11 sanction of choice." 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1336, at 113 & n.70 (1990):

> Professor Nelken aserts that in 96% of the reported cases in which Rule 11 is violated, attorney's fees are imposed as a sanction. Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment, 1986*, 74 Geo. L. J. 1313.

The District Court's exercise of its discretion in selecting the appropriate sanction here was eminently reasonable under the circumstances and under the applicable law. Consequently, the Court of Appeals' affirmance of that appropriate exercise of discretion was not erroneous.

Petitioners also argue that there was no finding by the District Court sufficient to establish a violation of Rule 11 and that it was therefore incorrect for the Court of Appeals to reverse the District Court's denial of sanctions. Petitioners' premise, that the District Court did not make a finding that Rule 11 had been violated, is completely belied by the District Court's unequivocal statement that the case "offered no hope whatsoever of success, and plaintiffs' attorneys surely knew it." (A26, 702 F. Supp. at 322.) The Court of Appeals correctly held in the first appeal that the finding by the District Court was tantamount to a finding that Rule 11 was violated. (A11-12, 886 F.2d at 440.) Thus, the Court of Appeals' ruling was fully consistent with the exercise of appellate authority clearly contemplated under *Cooter & Gell*.

Petitioners further argue that their Complaint against the President of the United States, the British Prime Minister and other defendants was viable under the precedents applicable to war crimes and war criminals. It is

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ticing lawyer is a more—not less—severe sanction than the imposition of a relatively modest monetary sanction.

manifest that such an argument, requiring the federal courts to adjudicate the President of the United States, the leader of one of the United States' closest allies, and other public officials to be war criminals is neither warranted by existing U.S. law nor by a good faith argument for the extension, modification, or reversal of existing law. On their motion to dismiss, Respondents raised numerous meritorious defenses, any one of which would doom Petitioners' case. These included head of state immunity, foreign sovereign immunity, lack of personal jurisdiction, the act of state and political question doctrines, and failure to state a cause of action. The District Court succinctly and correctly described the case as one having no hope whatsoever of success, and the Court of Appeals agreed with that assessment.

Moreover, the fact that Petitioners' Complaint and their other extensive filings caused counsel for Respondents to expend hundreds of hours researching and responding to Petitioners' laundry list of allegations "supported" by inaccurate references to United Nations Resolutions, numerous international conventions and other inapposite authorities, certainly does not constitute evidence that the initiation of the litigation was proper for purposes of avoiding Rule 11 sanctions. Indeed, this circumstance increases the severity of the Rule 11 violation. It was not reasonable for Petitioners to bring this case against the United Kingdom and its Prime Minister, in the face of the cumulative and thoroughly well-settled U.S. law that confers protection and immunity on the basis of the many grounds enumerated above. "An empty head but a pure heart is no defense. The Rule requires counsel to read and consider before litigating." *Thornton v. Wahl*, 787 F.2d 1151, 1154 (7th Cir.), *cert. denied*, 479 U.S. 851 (1986). *Cf. Business Guides v. Chromatic Communications Ent.*, 111 S. Ct. 922, 933-34 (1991) (Rule 11 imposes an objective standard of reasonable inquiry).

In sum, the decision by the Court of Appeals affirming the District Court's imposition of sanctions for violation

of Rule 11 was correct and should not be reviewed by this Court.

II. THE COURT OF APPEALS DID NOT ERR IN IMPOSING RULE 38 SANCTIONS

Petitioners contend that the Court of Appeals erred in ordering them to compensate Respondents, pursuant to Fed. R. App. P. 38, for the attorneys' fees and costs Respondents incurred on the first appeal. The Court of Appeals held that Rule 38 sanctions were appropriate in light of this Court's decision in *Argentine Republic v. Amerada Hess*, 488 U.S. 428 (1989), issued before the first appeal in this case, which "clearly bars plaintiffs' claim against the United Kingdom, and that so much was apparent to counsel for plaintiffs before they imposed upon the United Kingdom the burden of this appeal." (A13, 886 F.2d at 441.) Petitioners unsuccessfully sought further review of the Rule 38 sanctions order by means of a petition for rehearing, suggestion for rehearing *en banc*, their first petition for a writ of certiorari, raising the issue again in their second appeal, a second petition for rehearing, and a second suggestion for rehearing *en banc*.

Petitioners argued that the Foreign Sovereign Immunities Act ("FSIA") does not bar claims under the Alien Tort Statute for damages resulting from acts of a foreign sovereign alleged to constitute war crimes. This position is not tenable because, as the Court of Appeals pointed out in the first appeal, this Court in *Amerada Hess* "ruled unanimously and unequivocally that the [FSIA] provides the 'sole basis for obtaining jurisdiction over a foreign state in our courts.'" (A12, 886 F.2d at 440.)

Even before *Amerada Hess*, this principle of law was firmly established by this Court in *Verlinden*,[3] and by the

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[3] In *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 (1983), the Court stated:

> The [FSIA] *must* be applied by the district courts in *every* action against a foreign sovereign, since subject-matter juris-

Court of Appeals, in several cases including *Practical Concepts Inc. v. Republic of Bolivia*, 811 F.2d 1543 (D.C. Cir. 1987), and *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (*per curiam*) (Edwards, J. concuring), *cert. denied*, 470 U.S. 1003 (1985). The Court of Appeals expressly relied on its prior holding in *Tel-Oren*, in addition to *Amerada Hess*, to support the imposition of Rule 38 sanctions for a frivolous appeal in this case. (A12-13, 886 F.2d at 440-41.) In *Tel-Oren*, the Court of Appeals held that a suit against the Government of Libya, for damages arising from a terrorist attack in Israel, could not be maintained under the Alien Tort Statute because of the exclusive jurisdictional grant contained in the FSIA. 726 F.2d at 776 n.1 (Edwards, J.) ("Jurisdiction over Libya is barred by the [FSIA], which preserves immunity for tort claims unless injury or death occurs in the United States. . . ."); 726 at 805 n.13 (Bork, J.) ("Libya must be dismissed from the case because the [FSIA] plainly deprives us of jurisdiction over Libya (*citing Verlinden*)").[4]

Petitioners argue that the Rule 38 award, if it is allowed to stand, will deter counsel from seeking redress in U.S. courts "for the most grievous and criminal injury by an unbridled military." Petition at 64. That argument has no merit here and, indeed, seeks to obscure the strong public interest in making Rule 38 a significant, meaningful deterrent to the filing of frivolous appeals and in putting an end to litigation once jurisdiction has been fully and fairly adjudicated and found to be lacking.

> diction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity. . . .

(emphasis added). *See also* 461 U.S. at 491 n.16, 496.

[4] Chief Judge Robinson of the District Court reached the same conclusion in *In re Korean Air Lines Disaster of Sept. 1, 1983*, Misc. No. 83-0345, Mem. & Order at 11 (D.D.C. Aug. 2, 1985) ("[T]o hold that the Alien Tort Claims Act gives a cause of action and subject matter jurisdiction where the FSIA forbids it would make a nullity of the [FSIA]").

Undersigned counsel believe that the second appeal in this case also was frivolous and that additional Rule 38 sanctions would have been appropriate. However, in view of Petitioners' practice of relitigating every issue at every stage in this case, Respondents instructed undersigned counsel not to seek additional Rule 38 sanctions, so as not to provide Petitioners with still another issue to contest in this ever more pointless litigation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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